127-105

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 193.

FRANKLIN C. SMITH, APPELLANT.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, AND BOURBON COUNTY, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 13, 1884.

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1 No. 3001.

In the Circuit Court of the United States for the District of Kansas.

To the honorable judges of said court:

Franklin C. Smith, a resident of the city of Galesburg, Ills., and a citizen of the State of Illinois, brings this his bill against the Fort Scott, Humboldt & Western Railroad Company, a corporation organized under and by virtue of the laws of the State of Kansas and a citizen of said State, and the Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas—said commissioners are citizens of said State of Kansas and said county is a body politic and corporate, created by and existing under the laws of the State of Kansas and a citizen of said State—and, complaining, says—

That the said complainant did, on the — day of December, 1879, at a regular term of this court then being holden, and by the consideration of said court, duly recover his certain judgment at law for $267,113.19, and $14.55 costs of suit therein, against the said defendant, The Fort Scott, Humboldt & Western Railroad Company, which judgment is still of record, wholly unsatisfied, and unreversed; that thereupon the said complainant, in pursuance of said judgment, caused execution to issue and said execution was duly issued and returned unsatisfied.

The complainant alleges that the said Fort Scott, Humboldt & Western Railroad Company is wholly insolvent and has no property, assets, or things whatsoever out of which the aforesaid judgment may be realized save what shall be hereinafter set out and related in these premises.

Complainant alleges further and complains of the said commissioners of Bourbon county, Kansas, and said defendant that the county commissioners of said Bourbon county, having in view the material growth and financial prosperity of said county of Bourbon & State of Kansas, and being desirous of procuring the loca-

2 tion & construction of a railroad running from Fort Scott, the county seat & commercial center of said county of Bourbon, westerly on the north side of Marmaton river and to the city of Humboldt, in Allen county, State of Kansas, and the said county commissioners then believing that the construction of said railroad would add largely to the growth of the city of Fort Scott, and that it would be the means of securing to the business men and merchants of said city a large trade from persons living along the line of said projected railroad and from the country at the west of and in the vicinity of said city of Humboldt & county of Allen, and, also, that said railroad would furnish another outlet to the large coal-mining interests of Bourbon county located in the vicinity of Fort Scott, and thus secure a more extended coal market for said coal interests of said city & county, and thereby cause its rapid growth, and, consequenty, large benefits to the residents and property owners thereof; in furtherance of said enterprise and to carry the wishes of the inhabitants of said county into practical effect the board of county commissioners

of said county of Bourbon, in pursuance of the statute in such case made & provided, on the 23d day of July, 1869, passed a resolution in words & import as follows, to wit:

"That there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company, now organized or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route, in the general direction of Humboldt, Allen county, Kansas, and the bonds of said county be issued to said company for the payment of said subscription,
3 said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds should not be issued until the question be submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and should have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statute passed by the Legislature of the State of Kansas in such cases made & provided, and that said question should be submitted to said electors at a special election to be held at the usual places of holding elections in said county on Tuesday, the 24th day of August, 1869. At the said election the votes should be cast "for railroad bonds" and "against railroad bonds," and if it should appear upon a canvass of the votes at said election by the proper officers, according to law, that a majority of the votes cast upon said question were in favor of the said subscription, then the above order should be carried into practical operation by the issuing the bonds to said company whenever the county commissioners of Bourbon county were satisfied that the bonds therein provided for, with the other resources of said company, should be sufficient and adequate to complete the construction of the road-bed ready for the iron, from the city of Fort Scott to the west line of Bourbon county."

And complainant further alleges and shows unto the court that a notice was duly given to the people and legal voters of said county that said election would be held on the 24th day of August aforesaid; that said election was duly called and held on that day, and that on that day a vote was duly had at all of the proper voting precincts and places in said county, and that said election was held in accordance with the forms of law in such cases provided; and that the votes were cast in favor of and against said proposition,
4 and upon a correct canvass of said votes by the proper officer whose duty it was to make such canvass it was found (and such was the fact as to said election) that a majority of all the votes cast at said election as aforesaid were in favor of said proposition, and that a majority of the legal voters of said county of Bourbon were in favor of, and at said election voted in favor of, said subscription and the taking of stock in a railroad located according to the conditions expressed in the resolutions of the said county commissioners.

And complainant further shows unto the court that, after the result of said election had been announced, and in the month of October, A. D. 1870, a railroad company was duly incorporated and organized under and in pursuance of the general statute laws of the State of Kansas for the purpose of constructing and operating a railroad over and upon the route designated in said resolution of said county commissioners, to wit: West from the said city of Fort Scott, in and through Bourbon county, Kansas, and on the north side of the Marmaton river to the city of Humboldt, in Allen county, Kansas, which said incorporation was named and designated as the Fort Scott & Allen County railroad, and said railroad company thereupon made application to said county commissioners of Bourbon county for the aforesaid subscription to be made to their aforesaid company, viz., a subscription of one hundred & fifty thousand dollars to their capital stock; whereupon the said county commissioners, after consideration, on the 13th day of October, 1870, passed the following resolution, to wit:

"Whereas, upon a proposition submitted to the electors of Bourbon county, Kansas, on Tuesday, the 24th day of August, 1869, the board of county commissioners of said county were authorized to subscribe the amount of one hundred and fifty thousand dollars to the capital stock of any railroad running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton river, in the general direction of Humboldt, Allen county, Kansas, and to issue the bonds of said county for the payment of said subscription, said bonds to be payable in thirty years from the date of issue, and bearing interest, payable semi-annually, at seven per cent. per annum, now, therefore, it is ordered by the board of county commissioners of Bourbon county, Kansas, that Joseph I. Emmert, of Bourbon county, Kansas, be, and he is hereby, appointed subscription agent for Bourbon county, Kansas, and is hereby authorized and directed to subscribe for and in the name of Bourbon county, Kansas, one hundred and fifty thousand dollars to the capital stock of the Fort Scott & Allen County Railroad Company, yet upon this express condition, that said company or their assigns shall complete the construction of their road-bed, ready for the iron, from Ft. Scott to the western line of Bourbon county, Kansas, by the 1st day of July, 1872."

And said resolution was thus attested, viz:

Witness our hands this 13th day of October, A. D. 1870.

D. GARDNER, *Chairman*,
H. S. RATH,
DAVID R. COBB,
Commissioners.

3. And complainant further shows unto the court that the said Joseph S. Emmert, subscription agent, appointed as aforesaid on the day of —, & by virtue of the authority so conferred upon him by said board of county commissioners, proceeded to & did make the subscription upon the books of said company of one hundred & fifty thousand dollars to the capital stock of the said Fort Scott & Allen

County Railroad Company for and in behalf of said county and in the name of said county.

4. And the complainant, your orator, further shows unto the court that, in pursuance of the aforesaid subscription to the capital
6 stock of the said railroad company, the said municipal corporation, the County of Bourbon, became a shareholder in the said railroad company, and as such entitled to vote in the election of its officers, and, through the directors so chosen, to have a voice in the control & the management of the said road, and the said County Commissioners of said County of Bourbon, State of Kansas, selected and appointed several citizens of said county of Bourbon to be present at and attend the meetings of the stockholders of said railroad company, and to cast the vote of said county of Bourbon at such meetings, according to the interest therein of said county by reason of said subscription, and that said county commissioners of said county, at the election of officers of said railroad company, by their agent duly appointed for said purpose, presented the names of several citizens of said county whom they desired to represent said county in the board of directors of said railway company; that said persons so elected were duly elected and qualified as such directors of said railroad company, and, after they were so elected and qualified as aforesaid, they met with said board of directors of said railway company and had a large and the controlling interest therein, and assisted and advised in the business management of said railroad company from the time the said subscription was made to the capital stock of said railroad company as aforesaid continuously until long after the work performed by said complainant, as hereinafter set forth, was completed and accepted by said railroad company; and the complainant further shows unto the court that subsequent to making said subscription to the stock of said company as aforesaid and to the election of Samuel Manlove, Benjamin P. McDonald, John Stewart, & E. M. Hatch, and others, whose names are to the complainant unknown, to represent said county of Bourbon in said board of directors as aforesaid, the said county commissioners,
7 by a resolution of their said board, passed and recorded among the records of their proceedings as the board of county commissioners of said county of Bourbon, State of Kansas, July 28th, 1871, ratified & affirmed all their acts and proceedings respecting the making of said subscription to the capital stock of said railroad company and the appointment of the said directors of the said railroad company, and by said resolution repledged the good faith of said county of Bourbon in the making said subscription aforesaid, and declared their intention to conform to the terms of said subscription and the conditions of the vote of the electors of the said county, whereby they were authorized to take stock in the said railroad company as aforesaid. The resolution passed by said board is in the words & figures following, to wit:

"Whereas the board having this day been waited on by parties representing the Fort Scott & Allen County Railroad Company, with a request for action on the part of the board relative to the issuing of bonds voted by the people on the 24th day of August, 1869, and

it appearing to the board that considerable progress has been made in the work upon said railroad in this county, it is therefore ordered that the bonds aforesaid be prepared as soon as the same can be lithographed, and that they be laid in the fire-proof safe in the vault attached to the treasurer's office, with the signature of the chairman only affixed to all the bonds and coupons, to wait further action by the board."

And your orator further shows unto the court that the indebtedness upon which said judgment was obtained was one arising upon a certain contract, a copy of which is filed herewith, marked Exhibit "A," and made a part of this bill of complaint, and the complainant alleges that he entered into the said contract for the
8 grading of said railroad bed as aforesaid with the said railroad company at the solicitation of the president and directors of said railroad company, of which board the directors representing the said county of Bourbon had the controlling influence; and at the solicitation of said county commissioners of said county of Bourbon, who assured this complainant that the people of said county very much desired the building of said railroad, and that the bonds of said county were legally voted and would be delivered to said railroad company, so that said company could perform the stipulations of the contract as aforesaid with the complainant and said county commissioners and said county of Bourbon, promised and agreed to deliver said bonds to your orator if your orator would complete said work specified in said contract, which he then and there promised to do; and, further, that they, the said county commissioners, were acting in entire good faith, and that this plaintiff relied on the good faith of said county commissioners at the time he entered into said contract for the grading of said road, as they, the said county commissioners, were apprised and very well knew that said railroad company had little or nothing wherewith to pay for the large outlay necessary to grade said railroad bed except the municipal bonds above mentioned; and at the time when the said contract for the grading of said road-bed was made by the complainant with the president and directors of said railroad company the persons who were chosen and elected and qualified directors of said company for the county of Bourbon by reason of the said subscription to the capital stock of said company as aforesaid, and the county commissioners of said county of Bourbon were present and assisting, advising, and consenting to the making of said contract, and thereby confirming & ratifying all the previous actings and doings of said county commissioners respecting the making of
9 said subscriptions and repledging the faith of said county of Bourbon to the issuing and delivery of the bonds of said county in payment of said subscription and in payment to your complainant for the grading of said railroad bed.

Your orator further shows and alleges that he entered into said contract above mentioned with said railroad company relying upon the representations and assurances frequently and repeatedly made to him by said commissioners of said county of Bourbon that the subscription of said county to the capital stock of said company had

been legally made, and that the bonds of the county would be issued therefor and transferred to him whenever said road-bed should be completed in accordance with the provisions of said contract, and that if he had ever received the slightest intimation that this would not be done he would never have entered into said contract or performed said work.

And your orator further shows unto the court in this behalf that after the making of said contract and at divers times during the performance thereof between the 6th day of June, 1871, and the 6th day of June, 1872, the said board, president, and directors of the Fort Scott & Allen County Railroad Company aforesaid had numerous meetings for the transaction of business incident to the construction of said road-bed and carrying into effect the objects of said company and the completion of said railroad, at all of which meetings the said directors, representing said Bourbon county were present, and so took part in all the transactions of said board of directors as the representatives and agents of said county, and voted upon the stock subscribed by said county of Bourbon to said railroad company.

10 And your orator further shows unto the court that the sole and only inducement to him to take the said contract and make the large outlay of money to execute and perform the same was the pledged faith of the said Bourbon county, in connection with that of the other municipal corporation in said contract mentioned, and their promise to pay up their aforesaid subscriptions to the capital stock of said railroad company and to issue and deliver their aforesaid bonds to said railroad company as they in good faith and by the terms and conditions of their subscriptions ought to do.

Your orator further shows unto the court that it is well known to all the inhabitants, citizens, and legal voters of said county of Bourbon while your orator was engaged in the performance of said contract and long before the completion thereof that said work was being done and money expended by your petitioner upon the faith that said county had duly subscribed one hundred and fifty thousand dollars ($150,000.00) to the capital stock of said company and upon the assurance that it would issue its bonds therefor upon the completion of said contract; and your orator avers that said county commissioners procured said work to be done and said expenditures to be made by your orator by representing to your orator that said election had been legally held and said capital stock of said railroad company legally subscribed for by said county, and that the bonds of said county would be issued in payment of said stock and duly given to your orator when said contract should be completed by your orator, and no opposition was ever made thereto by any of the inhabitants, property owners, or legal voters of said county.

And this complainant alleges, as he has before alleged in his action at law, in which the aforesaid judgment was duly obtained, that, relying upon the acts and promises of the said county

11 of Bourbon, as hereinbefore recited and set forth in these premises, he duly and completely performed the said con-

tract, and that all his acts and doings thereunder were duly accepted, ratified, and approved by the said railroad company.

And the complainant further shows into the court that more than three years have elapsed since the completion of the work aforesaid under said contract, and the payment therefor has been due and undischarged and unpaid, yet the said railroad company, the president and directors, have taken no steps nor have they instituted any legal proceedings whatever to enforce the payment to them of the aforesaid subscription to the capital stock of said railroad company by said county of Bourbon, nor to compel the issuing & delivery of the aforesaid lands of said county of Bourbon in discharge of said subscription. And your orator charges that he is entitled to receive from said County of Bourbon and from the County Commissioners of said county the bonds of said county in the sum of one hundred and fifty thousond dollars, as authorized by the vote of the legal voters of said county as well as by the action and vote of said county commissioners after said election was held.

Your orator charges that the said Fort Scott, Humboldt & Western Railroad Company is one and the same corporation as the said Fort Scott & Allen County Railroad Company.

Inasmuch as said railroad company is insolvent and is unable to respond in damages or to satisfy said judgment, and forasmuch, therefore, as your orator is remediless in a court of law in the premises and can only have relief in a court of equity, where such matters are properly cognizable and relievable, your orator prays that an order or decree of this court may be made against said railroad company and the president and directors thereof ordering them to assign to this complainant their claim against the aforesaid County of Bourbon,
12 and that said County of Bourbon, through its proper officers, be ordered and decreed to cause said county bonds to be issued and delivered to your orator or to pay to your orator such part of his indebtedness as is equal to the face value of said bonds, with interest, and that the said County of Bourbon, by its proper officers, may be decreed to sign and issue in due form its said bonds in said amount, payable in thirty years from the date thereof, with semi-annual interest coupons attached, payable in New York, in accordance with the terms of the aforesaid subscription to the capital stock of said railroad company, payable to the said complainant, your orator; and that your orator may have such other and further relief in the premises or other & different relief as to this court shall seem meet.

May it please your honors to grant unto the complainant the writ of subpœna, directed to the marshal, to be served on the said Fort Scott, Humboldt and Western Railroad Company, defendants herein, and the said County of Bourbon and the said Board of Commissioners of said County of Bourbon, State of Kansas, defendants herein, commanding them & each of them, under a pain therein limited, to appear and answer the premises (but not under oath, answer under oath being hereby expressly waived), and to stand to, perform, and abide

such other & further order, direction, and decree as may be made against them or either of them.

And your orator will ever pray.

A. L. WILLIAMS,
ROSSINGTON & SMITH,
H. P. DILLON,
Complainant's Solicitors.

A. L. WILLIAMS, *Of Counsel.*

13 "Contract and agreement, made and executed this 6th day of June, 1871, by and between The Fort Scott and Allen County Railroad Company, State of Kansas, of the first part, and F. C. Smith and John Dunn, partners as F. C. Smith & Co., of Wyoming county, New York, of the second part, witnesseth:

"That the said party of the second part, for and in consideration of the sum of two hundred and seventy-five thousand dollars in bonds of Bourbon county, Kansas, and in bonds of the city of Humboldt and various townships of Allen county, Kansas, to be received at par by the party of the second part, to be paid at the times and in the various amounts hereinafter mentioned, do hereby stipulate and agree to grade a railroad bed from the city of Fort Scott, Bourbon county, Kansas, beginning at some point, to be designated by the party of the first part, on the north or west side of the Marmaton river, adjoining said city, and running to and through the city of Humboldt, Allen county, Kansas, to the line of the Missouri & Texas railway to a point not exceeding one-fourth of one mile from the present depot of said M., K. & T. Railway Co. at said city of Humboldt; to construct good and substantial railroad bridges over and across the Neosho river and over and across all streams on the line of said Fort Scott and Allen County railroad; also to construct all necessary culverts, water-courses, ditches, and cattle-guards on the line of said road.

"It is stipulated and agreed by the parties hereto that the location of said road shall not vary more than one mile from the route of the preliminary survey of said road, as made by Capt. T. I. Hurd, without the consent of the parties of the first part, and shall run not more than one-half mile from Uniontown, nor more than one mile from Marmaton City; that said road-bed shall be, on all em-
14 bankments four feet high and under, ten feet wide; on all embankments over four feet high and under twelve feet high, twelve feet wide; on all embankments over twelve feet high, fourteen feet wide; all cuts shall be sixteen feet wide; all earth slopes to be one and one-half feet horizontal to one foot vertical; all rock slopes to be one-fourth of one foot horizontal to one foot vertical; said road-bed to have a maximum grade of not over sixty feet to one mile; all culverts and water-courses to be made of rubble masonry, laid dry; cattle-guards of wood.

"It is further stipulated and agreed that said parties of the second part shall defray and pay all expenses of engineering connected with the location and construction of said road-bed, bridges, culverts, water-courses, and cattle-guards; that all of said work shall be fully

done and completed in a good and substantial and workmanlike manner on or before the 30 day of June, 1872; all the culverts, water-courses, ditches, and cattle-guards on said road-bed shall be located and their sufficiency determined by the chief engineer of the party of the first part in connection with the engineer of the parties of the second part, and in case of a difference of opinion between said engineers on any such question they shall select some competent disinterested third party, who shall determine the matter.

"For and in consideration of the foregoing stipulations and agreements to be done, executed, and performed by said parties of the second part, and the acceptance thereof by the party of the first part, the said part of the first part, its successors and assigns, do hereby stipulate and agree to pay to said party of the second part thirty thousand dollars in bonds (at par) of the city of Humboldt, Kansas, and township of Humboldt, Kansas, upon the completion of said road-bed, and its acceptance as aforesaid by the parties of the first part, from the Mo., Kan. and Texas Railway Co. line to the line of the Leavenworth, Lawrence and Galveston Railroad Co.'s line and the completion of the railroad bridge over and across the Neosho river in accordance with the conditions of this agreement by the said parties of the second part; and the party of the first part hereby agrees to pay to said parties of the second part the further sum of one hundred thousand dollars in bonds (at par) of Bourbon county, Kansas, and seventy thousand dollars in bonds (at par) of Humboldt township, Kansas, when the said road-bed shall be completed and the necessary and proper bridges, culverts, water-courses, ditches, & cattle-guards shall be fully built according to the terms of this contract, by the parties of the second part from the said point in the city of Fort Scott unto the bluffs in the eastern portion of Allen county, on the west side of the Marmaton river, and to pay to said parties of the second part, when the balance of said road-bed, to wit, from the line of said L., L. & Galveston railroad, in Humboldt township, Allen Co., K's, to the before-named point on the bluffs in the eastern portion of Allen Co., K's, is fully completed and united, according to contract, with all necessary bridges, culverts, water-courses, ditches, & cattle-guards, the further sum of twenty-five thousand dollars in bonds (at par) of Bourbon county, Kan., and at the expiration of six months thereafter the further sum of fifty thousand dollars in township bonds (at par) of township of Allen Co., K's, or Humboldt city bonds, or both, or, in lieu thereof, bonds of like value.

Endorsed: No. 3001. U. S. circuit court. Franklin C. Smith, compl't, *vs.* Ft. Scott, Humboldt and Western R. R. Co. *et al.*, def'ts. Bill in equity. Filed Jan'y 28, 1880. A. S. Thomas, clerk. A. L. Williams, Rossington & Smith, & H. P. Dillon, compl'ts sol'rs, Topeka, Kansas.

16 *Chancery Subpœna.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

The United States of America to Fort Scott, Humboldt and Western Railroad Company, the County of Bourbon, and the Board of Commissioners of said County of Bourbon, Greeting:

We command you and every of you that you appear before our judge of our circuit court of the United States of America for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Franklin C. Smith this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this 28th day of January, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] A. S. THOMAS, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed and a decree entered accordingly.

A. S. THOMAS, *Clerk.*

17 [Endorsed:] No. 3001. Circuit court United States, district of Kansas. Franklin C. Smith *vs.* Ft. Scott, Humboldt & Western R. R. Co. *et al.* Chancery subpœna. Returnable to rule day, first Monday in March, A. D. 1880. A. S. Thomas, clerk. —— ——, deputy clerk. Filed Feb'ry 17, A. D. 1880. A. S. Thomas, clerk. —— ——, deputy clerk. A. L. Williams, Rossington & Smith, & H. P. Dillon, comp't's sols.

U. S. Marshal's Return.

DISTRICT OF KANSAS, ss:

Received the within writ January the 28, 1880, and executed the same as follows, to wit: Served on the within-named the County of Bourbon, on the 12th day of February, 1880, at Bourbon Co., State & district of Kansas, by delivering to J. H. Brown personally a true & certified copy of this writ, he, said J. H. Brown, being then & there the deputy county clerk of said Bourbon county and the person in charge of said office; I did also at same time & place serve this writ on the within-named defendant, the Board of County Commissioners of said County of Bourbon, in like manner as above, said J. H. Brown

being then and there the deputy clerk of said defendant and in charge of said office.

B. F. SIMPSON,
Marshal, Kansas.
By GEO. F. SHERITT, *Deputy.*

Service	4 00
R. R.	12 00
Hotel	3 50
	$19 50

I certify that I further executed this writ at the county — Sedgwick, State and district of Kansas, on the 16th day of February, 1880, by delivering personally to David Emmert, vice-president of the within-named Fort Scott, Humboldt and Western Railroad Company, a true and certified copy of this writ, with the endorsements thereon.
Fees, $11.72.

B. F. SIMPSON,
U. S. Marshal.
By S. P. WADE, *Deputy.*

17½ In the Circuit Court of the United States for the District of Kansas.

FRANKLIN C. SMITH, Complainant,

vs.

THE FORT SCOTT, HUMBOLDT & WESTERN R. R. Co. *et al.*

We enter ourselves security for costs in said case and promise to pay all costs which may accrue to the opposite parties in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by compl't we hereby agree and stipulate that execution may issue against our property for any costs taxed against complainant.
Dated 11th day of February, 1880.

F. C. SMITH.
JOHN C. STEWART.
JOHN McFARLAND.

17¾ Endorsed: No. 3001. Franklin C. Smith *vs.* Ft. Scott, Humboldt & Western R. R. Co. *et al.* Security for costs. Filed Feb'ry 23, 1880. A. S. Thomas. clerk.

Approved Feb'ry 23, 1880.

A. S. THOMAS, *Clerk.*

18 *The Demurrer of the Board of County Commissioners of the County of Bourbon, Kansas, and Bourbon County, Kansas, to the Bill of Complaint of Franklin C. Smith, Complainant, against the Fort Scott, Humboldt and Western Railway Company and these Defendants.*

In the Circuit Court of the United States for the District of Kansas.

These defendants, The Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrrr showeth that the said complainant hath not in and by his said bill made or stated such a case as does or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defefendants; wherefore these defendants respectfully demand of this honorable court whether they shall be compelled to make any further answer or other answer to the said bill or any of the matters therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

HULETT & McCLEVERTY,
Solicitors for the Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas.
E. M. HULETT, *Of Counsel.*

I do hereby certify that, in my opinion, this demurrer is well founded in point of law.

E. M. HULETT,
Of Counsel.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

I, Charles W. Goodlander, chairman of the Board of County Commissioners of Bourbon County, Kansas, being duly sworn, depose and say that the foregoing demurrer to the bill of complaint of Franklin C. Smith is not interposed for delay.

C. W. GOODLANDER.

19 Subscribed and sworn to before me this 26th day of February, A. D. 1880.

JNO. C. SMITH,
Notary Public, Jackson Co., Mo.

My commission as notary public expires April 5th, 1882. Certificate of official character filed in office of "Second Auditor Treasury and Commissioner of Pensions, Washington, D. C.:

Endorsed: No. 3001. F. C. Smith, Compl't, *vs.* The Board of Co. Com. of Bourbon Co., K's *et al.* Demurrer. Filed Febr'y 28, 1880. A. S. Thomas, clerk. Hulett & McCleverty, sol'c't's for Co.

O. B. D. 132.

F. C. SMITH

vs.

THE FORT SCOTT, HUMBOLDT, AND WESTERN R. R. Co. *et al.*

SATURDAY, *February 28th*, 1880.

Now comes The Board of County Commissioners of the County of Bourbon, Kansas, and Bourbon County, Kansas, defendants in said suit, by Hulett & McCleverty, their solicitors, and enter their appearance in said suit and to the complainant's bill of complaint filed therein.

O. B. D. 189.

June Term, 1880. In Equity.

FRANKLIN C. SMITH
vs.
FT. SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY *et al.* } 3001.

McCRARY, *Circuit Judge:*

Upon the authority of Lewis *vs.* Commissioners of Bourbon
20 County, 12 Kansas, 186, I hold that under sec. 1, chap 24, laws of 1866, it is necessary, in order that a county may make a valid subscription to the stock of a railroad corporation, that such corporation should be named in the proposition submitted to the voters and in the other proceedings anterior to the execution of the subscription.

Upon the question whether the County of Bourbon can be held bound by the subscription set out in the bill, upon the principle of estoppel, I decline to hear further argument.

This question is important. The sum involved is large; and it is not free from difficulty. Counsel have filed no briefs. Let an order be made directing a reargument of this question at the next term. The clerk will notify counsel.

AT CHAMBERS, KEOKUK, *Aug.* 3, 1880.

It is ordered that this suit be, and is hereby, set down for argument at the next term of this court.

FRANKLIN SMITH
vs.
FT. SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY *et al.* } 3001.

JUNE 10, 1881.

Now come the parties hereto, by their solicitors, and thereupon the defendant's demurrer to complainant's bill came on to be heard and was argued by counsel. On consideration whereof it is ordered by the court that said demurrer be, and is hereby, overruled; and, on motion of complainant, leave is given him to amend his bill by the July rules, 1881, defendant to answer by August rules, 1881, and complainant to reply thereto *instanter*.

21 FRANKLIN C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY and The Board of County Commissioners of Bourbon County, Kansas, Defendant. } 3001.

FRIDAY, *December* 2, 1881.

By consent of complainant, the defendant, The Board of County Commissioners of Bourbon County, Kansas, in the above-entitled action it is ordered that the complainant have leave to amend his bill, and that said amendment shall be filed within 10 days from the 1st day of December, 1881, and that an office copy of said amendment be made and served upon the defendants' solicitors; and it is further ordered that the said defendants have until the February rules to answer said amended bill of complaint, said complainant to reply *instanter;* that said complainant shall have from the date of filing of said amended bill until the 15th day of March, 1882, in which to take his testimony, the defendant, The Board of County Commissioners of Bourbon County, to have from the 15th day of March, 1882, to the 15th day of May, 1882, to take its testimony, said testimony to be there closed, and the cause set down for hearing at the June term, 1882.

G. G. FOSTER, *Judge.*

FRANKLIN SMITH
vs.
FT. SCOTT, HUMBOLDT & WESTERN R. R. CO. *et al.* } 3001.

FRIDAY, *June* 9, 1882.

It is ordered by the court that respondents answer herein by July rules, 1882, and leave given complainants to reply *instanter.*

22 In the Circuit Court of the United States for the District of Kansas.

FRANKLIN C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY and The Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, Defendants.

The answer of the said "The Board of County Commissioners of Bourbon County, Kansas," to the bill of complaint of Franklin C. Smith, complainant.

The said defendant, "The Board of County Commissioners of Bourbon County, Kansas," reserving all right of exception to the said bill of complaint, for answer thereto, says—

That "The Board of County Commissioners of Bourbon County, Kansas," was at the several dates set forth in said bill of complaint, and long prior thereto, and still is, the proper corporate name of the corporation controlling and including the territory composing the county of Bourbon, in said State of Kansas, and as such now an-

swers for both the so-called parties to said bill of complaint, designated therein as "The Board of County Commissioners of Bourbon County, Kansas," and "Bourbon County, Kansas."

And said defendant admits that it is a body politic and corporate, created by and existing under the laws of the State of Kansas, and is a citizen of said State of Kansas; admits that said complainant is a citizen of the State of Illinois; admits that at the regular December term, A. D. 1879, of this court said complainant recovered
23 a pretended judgment claimed to be upon the said contract in said bill of complaint mentioned for the said sum of $267,132.00 and costs, against the said "The Fort Scott, Humboldt and Western Railroad Company," and that said judgment is still unreversed and unsatisfied; also, that execution was issued thereon and returned unsatisfied; admits that the said "The Fort Scott and Allen County Railroad Company" became and was, in October, A. D. 1870, duly incorporated under the general laws of the State of Kansas by the filing of its charter, duly executed, as provided by the laws of said State, and that afterwards the name of said railroad company was changed to that of the Fort Scott, Humboldt & Western Railroad Company, and said railroad company, by either of said names, was thereafter one and the same corporation. Defendant, further answering, says that it denies that said judgment in favor of said complainant was duly and regularly obtained against said railroad company, but alleges on information and belief the facts to be that at the commencement of said action at law there was nothing due to said complainant upon said contract in said bill of complaint mentioned; that long prior to commencing said suit in which said judgment was obtained said railroad company had ceased to exist; that said complainant, by fraud and collusion with one D. B. Emmert, who had formerly been vice-president of said railroad company when it was in lawful existence, and for the purpose and with the intent of afterwards bringing this suit, procured said D. B. Emmert to make an acceptance of service of summons in said action at law, he making said acceptance of service as vice-president of said railroad company, although said complainant and said D. B. Emmert well knew that said railroad company then had no legal existence and had not had for more than five years before said action at law was commenced, and asks proof thereof. Defendant denies that said railroad company ever opened books, as required by law,
24 for the purpose of taking subscriptions to its capital stock, or that it ever did in fact take or receive any subscriptions to its capital stock, or that it ever completed its orginization as required by law, by reason whereof its legal existence ceased and expired in A. D. 1875 and long prior to the commencement of said action at law, but as to these matters this defendant is an utter stranger and craves proof thereof.

Defendant further avers and shows to the court that on the 16th day of February, A. D. 1875, pursuant to the decree of this court, in a suit then pending therein, wherein one M. S. Carter was complainant and Henry L. Shepherd, Charles B. Gray, L. W. Shepherd, George A. Amos, D. B. Emmert, The Fort Scott, Humboldt & West-

ern Railroad Company, The Farmers' Loan & Trust Company of the City of New York, and John A. Davenport were defendants, which said decree was rendered on the 28th day of November, A. D. 1874, and which ordered the foreclosure of the mortgage set forth in the bill of complaint therein and a sale to be made thereunder and pursuant thereto—

There was, on said 16th day of February, A. D. 1875, a sale made to said M. S. Carter of all the property, real and personal, of said railroad company, and all of its rights, privileges, and franchises, which sale was afterwards confirmed by said court and a proper deed of conveyance made, all of which was then well known to said complainant and to said D. B. Emmert, he being the same D. B. Emmert who was one of said defendants therein, and said sale was long prior to said action at law; and defendant further avers, on information and belief, that long prior to the bringing of said action at law any and all claims, if any there were, which defendant does not admit, in favor of said complainant and against said railroad company, had been and were barred by the statute of limitations of said State of Kansas, but the said complainant and the said D. B.
25 Emmert by fraud and collusion, confederating together, intending to injure and defraud this defendant, obtained said judgment at law to be rendered when, in fact, nothing was due to said complainant upon the claims sued on in said action at law, and of this and of each and every of the matters and things by complainant alleged as to what, if anything, was due to him in said action at law, when the same became due, and the manner of obtaining said judgment at law, defendant asks that said complainant show by his proofs herein.

Defendant avers that said railroad company never filed in the office of the register of deeds of said county of Bourbon or elsewhere, as required by law, a profile and map, or either of them, of its proposed route through said county of Bourbon, and never had or obtained, by purchase or otherwise, a right of way through said county of Bourbon, and never at any time had any right or authority to build or construct any portion of its proposed road-bed in or through said county, and all of this said complainant well knew at and before the making of said alleged contract.

Defendant admits that on the 23rd day of July, A. D. 1869, the Board of County Commissioners of Bourbon County, Kansas, did, in regular session, adopt the resolution of that date, and which is, in part, set forth upon pages 2 and 3 of complainant's bill herein, but avers that the facts with reference thereto were these:

That pursuant to an order regularly and lawfully made by the Board of Commissioners of said County of Bourbon, and after notice thereof lawfully given, an election was, on the 7th day of May, A. D. 1867, held in said county of Bourbon in conformity to law upon the following proposition, to wit:

FORT SCOTT, *March 9th*, 1867.

That there be subscribed in the name and for the benefit
26 of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any

railroad company, now organized or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo and Neosho railroad running westward via Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof, and bearing interest at the rate of seven (7) per centum per annum:

Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of all the votes cast in favor of the same, in pursuance of an "Act to authorize counties and cities to issue bonds to railroad companies," approved February 10th, 1865, and that said question shall be submitted to said electors at a special election on the 7th day of May, A. D. 1867.

At said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the county commissioners of Bourbon county are satisfied that the road-bed of the Tebo and Neosho railroad is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the said road-bed and connect the said point with the city of Fort Scott.

(Signed) J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIMM,
Commissioners.

Attest: J. S. EMMERT, *Clerk.*

27 That upon a canvass being made of the votes cast at said election on said 7th day of May, A. D. 1867, by the board of county commissioners of said county of Bourbon, said proposition was declared by said board to have been carried and was so entered by said board upon the records of its proceedings upon the 10th day of May, A. D. 1867, the date of said canvass, but by reason of a mistake and oversight said board of commissioners did not count or canvass the votes cast on the said May 7th, 1867, at said election in Franklin township, one of the municipal townships in said county, the votes in which said townships had been lawfully cast at said election, and the majority of said votes then and there cast was largely against said proposition and ought to have been counted and canvassed by said board of canvassers on the said 10th day of May, A. D. 1867, and had the said votes so cast in said township been counted and canvassed by said board of canvassers along with the other votes cast in said county of Bourbon at said election on said May 7th, A. D. 1867, said board of canvassers would have found said proposition then and there voted upon to have been lost and defeated.

That immediately thereafter the fact of said defect in said canvass and count of said vote, as above set forth, became and was known

to said board of county commissioners of said county of Bourbon, and became and was a matter of public and general knowledge in said county. Afterwards, on the 23d day of July, A. D. 1869, certain officers and representatives of the Tebo and Neosho Railroad Company, a railroad corporation organized and existing under the laws of the State of Missouri, since known as the Missouri, Kansas and Texas Railway Company, which corporation was then proposing to build a railroad south and west through said State of Missouri and through said county of Bourbon, appeared before
28 said board of county commissioners of said county of Bourbon, then in regular session, and it was then and there agreed by and between said officers and representatives of said Tebo and Neosho Railroad Company and said board of county commissioners that a new election should be held in said county of Bourbon on August 24th, 1869, for the purpose of obtaining the assent of the legal electors of said county to subscribing said $150,000 mentioned in said proposition voted upon as aforesaid on May 7th, 1867, and, if said election resulted favorably, that the same be subscribed to the capital stock of said Tebo and Neosho Railroad Company; and it being then and there understood between said parties that the route of said Tebo and Neosho Railroad Company would run from Fort Scott, about the center, near the east line of said county of Bourbon in a southwest direction on the south side of the Marmaton river, it was also agreed, in order to obtain more votes for said proposition, to also submit a proposition, to be voted upon at the same time, for aid to a railroad to be built west from Fort Scott on the north side of the Marmaton; all of which was embodied and set forth in an order then made by said board of county commissioners, then in regular session, on said 23rd day of July, A. D. 1869, part of which said order is set forth by complainant upon pages two and three of his said bill of complaint herein, and which order then so made is in full as follows, to wit:

FORT SCOTT, *July 23rd*, 1869.

Board met pursuant to adjournment. Present, full board; D. Gardner, chairman of board; L. Roberts, David R. Cobb, commissioners. The following proceedings were had under application from officers and directors of the Tebo and Neosho Railroad Company to the board to subscribe stock to the said railroad, to wit: Application being made to the board by the officers and directors of the Tebo and Neosho Railroad Company to subscribe stock to said rail-
29 road company to the amount of $150,000.00 in pursuance of the railroad election held May 7th, 1867, the board, upon mature consideration, decided that it was not advisable to make such subscription at the present time. It is, however, further considered by the board that the following order be made in the premises:

Be it ordered by the County Commissioners of the County of Bourbon, State of Kansas, that there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter

that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route, in the direction of Humboldt, Allen county, Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per centum per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid and shall have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statutes in such cases made and provided, and that said question shall be submitted to said electors at a special election on Tuesday, the 24th day of August, A. D. 1869. At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds;" and if it shall appear upon a canvass of votes cast at said election by the proper officers, according to law, that a majority of the votes cast upon said question are in favor of said subscription then the above order shall be carried into practical operation by the issuing of the bonds to said company whenever the county commissioners of Bourbon county are satisfied that the bonds herein provided for, with the other resources of said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county; and whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad; and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th of May, 1867, aforesaid, will be generally satisfactory to the people of the county:

It is therefore ordered and provided that the decision of this question by the qualified voters of said county at the said election in favor of such subscription shall be also a decision in favor of the former subscription of the 7th of May, 1867. Being made at once, county commissioners, will accordingly in such case make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

D. GARDNER,
Ch. of Board.
L. ROBERTS,
DAVID R. COBB,
Commissioners.

And defendant denies that said election, so ordered to be held in said county of Bourbon on said 24th day of August, 1869, was duly called and held on said day, and denies that notice was duly given to the people and legal voters of said county, or that any notice whatever, as required by law, was given or made of said proposed

election, but admits that a pretended but unlawful election was held at the different voting precincts in said county upon said
31 day, at which a large number of the legal voters of said county voted, and aver the facts to be that both of the propositions embodied in said order of July 23rd, 1869, were from that date up to said August 24th, A. D. 1869, the subject of discussion among the legal voters of said county, and were both voted upon and understood to be voted upon by the legal voters of said county at said pretended election on said 24th day of August, A. D. 1869, but because of the form of said order of submission and of the vote, as therein ordered to be made, the legal voters voting at said pretended election were prevented from voting for or against either of said propositions in separate ballots, and were compelled to and did vote for or against both of said propositions in a single ballot, and defendant admits that the votes cast at said pretended election, so held on said August 24th, A. D. 1869, were afterwards, on August 27th, A. D. 1869, canvassed and counted by the board of county commissioners of said county the same as the votes cast at a regular and lawful election were by law required to be counted and canvassed, and the action and order of said board of county commissioners with reference to said pretended election, and the proposition then voted upon is shown by the record of the proceedings then had by said board on said 27th day of August, A. D. 1869, which said record of proceedings is as follows, to wit:

FORT SCOTT, *August 27th*, 1869.

Board met pursuant to order to canvass the vote of the election held on the 24th inst. in relation to the railroad bonds.

Present: A full board.

The following is the result of the election:

Township.	For bonds.	Against bonds.
Osage	6	76
Freedom	9	114
Timberhill	18	114
32 Franklin	3	171
Marion	63	61
Marmaton	46	40
Scott	229	7
Fort Scott, 1st ward	504	
Fort Scott, 2nd ward	532	
Drywood	13	30
Pawnee	5	60
	1,428	703

And it is declared that there was a majority for the railroad bonds of seven hundred and twenty-five (725), and that the question was carried, subject to the conditions of the call for said election.

The propriety of subscribing stock to the Tebo and Neosho Railroad Company was duly considered and the following action taken:

Whereas an election was held in the county of Bourbon and State of Kansas on the 7th day of May, A. D. 1867, upon the following proposition, to wit:

"Be it ordered by the County Commissioners of Bourbon County, Kansas, that there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company, now organized or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo and Neosho railroad running westward via Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof and bearing interest at the rate of seven (7) per centum per annum: Provided, That
33 said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of all the votes cast in favor of the same in pursuance of an "Act to authorize counties and cities to issue bonds to railroad companies," approved February 10th, 1865, and that said question shall be submitted to said electors at a special election on the 7th day of May, A. D. 1867. At said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the road-bed of the Tebo and Neosho railroad is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the said road-bed and connect the said point with the city of Fort Scott.

(Signed) J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIMM,
Commissioners.

Attest: J. S. EMMERT, *Clerk.*

Which said proposition was declared carried on a canvass of said votes according to law, and so stands recorded on the public records of the county; and whereas some question arose afterwards as to the propriety and legality of subscribing the stock then voted to the Tebo and Neosho Railroad Company, an election was ordered and held in said county of Bourbon and State aforesaid, upon the following proposition, to wit: Be it ordered by the county commissioners of the county of Bourbon and State of Kansas—

That there be subscribed in the name and for the benefit of the

county of Bourbon, in the State of Kansas, one hundred and
34 fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter that shall construct a railroad commencing at the city of Fort Scott, in the county of Bourbon and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route in the general direction of Humboldt, Allen county, Kansas, and the bonds of said county to be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid and shall have received a majority of all votes cast upon said proposition in favor thereof in pursuance of the provisions of the statute in such case made and provided, and that said question shall be submitted to said electors on Tuesday, the 24th day of August, A. D. 1869.

At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear, upon a canvass of the votes cast at said election by the proper officers according to law, that a majority of the votes cast upon said question are in favor of said subscription then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the bonds therein provided for, with the other resources of the said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county; and whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad;
35 and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th day of May, 1867, aforesaid, will be generally satisfactory to the people of the county, it is ordered and provided that the decision of the question by the qualified voters of said county, at the said election, shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once to the Tebo and Neosho Railroad Company, and the board of county commissioners will accordingly in such case make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

(Signed) D. GARDNER,
Ch. of Board.

L. ROBERTS,
DAVID R. COBB,
Commissioners.

And whereas it appears from the canvass of the votes upon the proposition submitted on the 24th day of August, 1869, that fourteen hundred and twenty-eight (1428) votes were cast in favor of said proposition and seven hundred and three (703) votes were cast against the same, whereby the said last-recited proposition was carried by a majority of all the votes cast, and the proposition voted upon at the election of the 7th day of ——, 1867, was reaffirmed: Therefore, in pursuance of said vote and the authority vested in us by law, we, the Board of County Commissioners of Bourbon County, do hereby constitute and appoint W. A. Shannon our agent to represent the county before the board of directors of the Tebo and Neosho Railroad company, and we hereby authorize and empower him, the said W. A. Shannon, to subscribe one hundred and fifty thousand dollars ($150,000) to the capital stock of the Tebo
36 and Neosho Railroad Company in the name and for the benefit of the county of Bourbon, said subscription to be made upon the express condition, which is hereby made a part of said subscription, that the bonds of said county of Bourbon in payment of said subscription shall not be delivered to said Tebo and Neosho Railroad Company; nor shall said county become liable for the payment of any portion of said subscription of stock until the road-bed of the Tebo and Neosho Railroad Company is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct and complete the road-bed of said Tebo and Neosho railroad from Sedalia, in the State of Missouri, to said city of Fort Scott, in the State of Kansas.

And provided further, That the subscription shall be void unless said road-bed shall be so completed from Sedalia to Fort Scott by or before the 1st day of January, A. D. 1872.

And provided further, That no interest shall accrue or be paid on said bonds until the same shall have been delivered to said railroad company according to the terms and conditions before mentioned.

In testimony whereof the Board of County Commissioners have hereunto subscribed their names and caused their seal to be affixed at the city of Fort Scott, Kansas, on this 27th day of August, A. D. 1869.

(Signed) D. GARDNER,
LAWRENCE ROBERTS,
DAVID R. COBB,
Commissioners.

Attest: C. FITCH, *County Clerk.*

And defendant alleges that no notice or election ever was had in said county with reference to the proposition mentioned in complainant's bill herein except as hereinbefore set forth, and avers that the officers of said Fort Scott and Allen County Railroad Company had full knowledge and notice of all the facts, matters, and
37 things herein set forth with reference to said pretended election of August 24th, A. D. 1869, and of the action and proceedings of said county and of the board of county commissioners of said county in and about the same, at and prior to the time of the alleged

and pretended subscription of said county to the capital stock of said Fort Scott and Allen County Railroad Company, and so also did said complainant have full knowledge and notice of the same by the public records of said county of Bourbon and by his own personal and private investigation and inquiry, and had such knowledge and notice at and prior to the 6th day of June, A. D. 1871, when he avers he made the alleged contract attached to his said bill of complaint herein.

Defendant admits that after said August 24th, A. D. 1869, the said Fort Scott and Allen County Railroad Company was legally organized and chartered, as set forth in said bill, for the purpose of constructing "a railroad commencing at the city of Fort Scott, in said county of Bourbon, running from thence west, north of the Marmaton river, upon the most practicable route in the general direction of Humboldt, Allen county, Kansas."

Admits that on the 13th day of October, the board of county commissioners of said county of Bourbon in regular session adopted the resolution of that date, set forth on pages five and six of said bill of complaint, appointing one Joseph S. Emmert as the agent of said county to make a subscription to the capital stock of said Fort Scott and Allen County Railroad Company the sum of one hundred and fifty thousand dollars, and to make said subscription only upon the condition "that said railroad company or its assigns should complete the construction of their road-bed, ready for the iron, from Fort Scott to the western boundary of Bourbon county, Kansas, by the 1st day of June, A. D. 1872."

38 But said defendant denies that said Joseph F. Emmert ever accepted said trust as such subscription agent; denies that he or that any one else for said county and with authority therefor ever did make said subscription or any subscription to the capital stock of said Fort Scott and Allen County Railroad Company by virtue of said pretended election of August 24th, A. D. 1869, or by other authority, or to the capital stock of any other railroad company, except that W. A. Shannon, as agent as aforesaid of said county, did subscribe to the capital stock of the said Tebo and Neosho Railroad Company the said sum of $150,000 mentioned in said orders of July 23rd, 1869, and August 27th, 1869, aforesaid, and said bonds have since been issued. Defendant denies that said County of Bourbon ever became or was or ever acted as a stockholder of or in said Fort Scott and Allen County Railroad Company or said Fort Scott, Humboldt and Western Railroad Company, or ever appointed or authorized any agent or agents to vote or act for it as a stockholder in said last-named companies or either of them, or in any capacity whatever, in relation to or connection with said railroad companies or either of them; denies that said county, or any one for it, with its authority, presented any one at any of the corporate elections of said railroad companies as its choice for directors thereof; denies that it ever in any manner whatever took any part in the management of the business affairs of said railroad company or in advising with reference to the same at any time whatever; denies that there ever was a director in said railroad company chosen as or who was the

representative of said county; denies that the board of county commissioners or any other officer of said county or any other person by or on behalf of said county and with its authority advised with reference to the making of said alleged contract, Exhibit "A," attached
39 to said bill of complaint, or in any manner asked or solicited said complainant to enter into or perform said contract or in any manner gave him any assurances as to the validity or otherwise of said alleged subscription or as to the legality or otherwise of the said pretended election of August 24th, A. D. 1869, or of any other proceedings in and about the same; denies that said pretended outlay or any part thereof alleged to have been made by said complainant was at the instance or with the encouragement, expressed or implied, of said county, or that said bonds would be issued by it to him upon the completion of said alleged contract; all of which was at all times well known to said complainant by reason of his personal examination and investigation of the same.

Defendant admits that afterwards, on July 28th, A. D. 1871, the officers of the said Fort Scott and Allen County Railroad Company made a demand upon the board of county commissioners of said county of Bourbon that the amount of said $150,000 in bonds of said county then claimed by said railroad company to be due to it upon said supposed subscription be issued to it at once by said county, as shown by said resolution of said board of date of said July 28th, 1871, and set forth in complainant's bill herein, which demand was by said board refused, as set forth in said resolution; but defendant admits that said board, then supposing said pretended election of August 24th, A. D. 1869, to have been legal, and that such election amounted legally to a subscription to the capital stock of said railroad company, did cause said bonds to be printed and deposited in the vault in said county in blank ready for signature, should said Fort Scott and Allen County Railroad Company comply with the condition of the vote of said pretended election, and should said railroad company then satisfy said board of the legal obliga-
40 tion of said county to execute and issue said bonds; that said railroad company wholly failing to do this, said board refused to comply with said demand. Defendant also avers and shows to the court that on June 3rd, A. D. 1872, the officers and duly authorized agents of the said Fort Scott and Allen County Railroad Company appeared before said board, then in regular session, and again made demand that said bonds be issued to it, and said board after due consideration, finding that said conditions had not been complied with, and that said county was under no legal obligation to comply with said demand or to issue said bonds, did, upon the next day, June 4th, A. D. 1872, pre-emptorily refused to issue said bonds by a resolution and order of said road that day adopted in regular form and duly entered upon the record of its proceedings.

That afterwards, on August 12th, A. D. 1873, the said Fort Scott, Humboldt and Western Railroad Company, as the successors of said Fort Scott and Allen County Railroad Company, by its duly authorized officers and agents, appeared before said board of county commissioners of the county of Bourbon, then in regular session, and

again made demand upon said board that said $150,000 in said bonds of said county be at once issued to said railroad company, which said demand said board then by resolution and order that day duly entered upon the record of its proceedings, as required by law, did pre-emptorily refuse, and did further order and direct at the same time that said blank bonds theretofore deposited in the treasurer's vault of said county pursuant to the said order of said board of date of July 28th, A. D. 1871, be at once removed from said vault and destroyed; all of which was accordingly done, and all of which said railroad company and said complainant then well knew at the time, and all of which was duly entered upon the pub-
41 lic records of the proceedings of said board, and was at said several dates and afterwards carefully read by said complainant and his agents and attorneys, and by the officers, agents, and attorneys of said railroad company, and defendant avers and shows to the court that all of the matters and things herein alleged have been at all times well known to said complainant and to said railroad company.

And defendant avers that said complainant ought not to have or maintain his said suit and bill of complaint, nor is he entitled to the relief demanded herein, because more than five years have elapsed since the holding of said pretended election of August 24th, A. D. 1869, and more than five years have elapsed since October 13th, A. D. 1870, the date of said pretended subscription to the capital stock of said Fort Scott and Allen County Railroad Company, and more than five years have elapsed since the making of said several demands by said railroad company upon said board of county commissioners of said county of Bourbon—that is to say, the demands made, respectively, on July 28th, A. D. 1871; on June 3d, A. D. 1872, and on August 12th, A. D. 1873, for the issuance of said bonds by said county to said railroad company, and before the commencement of this suit and before complainant filed his bill of complaint herein, and that complainant's claim, if any he had, which defendant does not admit, did not arise or accrue to him within five years before said bill was filed, but the same was then barred by the statute of limitations of said State of Kansas, and of this the defendant claims the same benefit as if he had so pleaded the same in this cause.

Defendant further avers that immediately after said August 12th, A. D. 1873, and in the said year, A. D. 1873, said railroad company became and was practically dissolved, by wholly abandoning its organization and by ceasing from that time ever after to act in any capacity whatever, or to do or transact or attempt in any manner to do or transact any business as a corporation, or in any re-
42 spect whatever, and this has always beeen well known to said complainant.

And this defendant, further answering, says it may be true, for anything this defendant knows to the contrary, that the contract set forth in complainant's bill was duly made and entered into by and between said complainant and said railroad company, as is in said bill alleged, and that there may at some time have been some amount due him thereon, but that defendant is an utter stranger to

all and every such matters and cannot form any belief concerning the same and asks proof thereof; and this defendant denies that said complainant or said railroad company ever complied with the conditions made and set forth in the said order of election dated July 23rd, A. D. 1869, or with the conditions made and set forth in said order of October 13th, 1870.

And defendant, further answering, admits that said railroad company was at all times insolvent; admits that the only assets it ever had was the supposed subscription of said county of Bourbon and the subscriptions authorized to be made by certain municipalities in Allen county, Kansas, which last-mentioned were the city of Humboldt, $25,000.00, to be paid in the bonds of said city; the township of Humboldt, $75,000.00, to be paid in the bonds of said township, and the township of Salem, $25,000.00, to be paid in the bonds of said township, but avers the fact to be that all of said subscriptions authorized to be made by said municipalities in Allen county, Kansas, were each upon the condition that said sums were to be wholly expended in said municipalities, and upon the further condition that no part of said sums was to be paid to said railroad company or its assigns until said railroad was completed and in operation through said municipalities, respectively; neither of which said conditions were ever at any time complied with.

43 And defendant denies all wrongful intent or action, as charged in said bill, without this, that there is any other matter, cause, or thing in said complainant's bill of complain contained material or necessary for this defendant to make answer to herein and not herein well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

J. D. McCLEVERTY,
Sol. for said Def't.

Endorsed: No. 3001. In equity. Franklin C. Smith *vs.* The Fort Scott, Humboldt & Western R. R. Co. and The Board of County Commissioners of Bourbon Co., Kan. Answer of Board of County Commissioners. Filed July 3, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

44 In the Circuit Court of the United States for the District of Kansas.

FRANKLIN C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN R. R. Co. *et al.*, Defendants. } No. 3001.

Replication of Franklin C. Smith, complainant, to the answer of The Board of County Commissioners of Bourbon County, Kansas, defendant.

This repliant, saving and reserving unto himself now and at all

times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of said defendant, The Board of County Commissioners of Bourbon County, is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court may direct, and humbly prays as in and by his said bill he has already prayed.

ROSSINGTON, JOHNSON & SMITH,
Complainant's Solicitors.

Endorsed: No. 3001. Franklin C. Smith, complainant, *vs.* The Fort Scott, Humboldt & Western R. R. Co. *et al.*, defendants. Replication. Filed Aug. 7, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy. Rossington, Johnson & Smith, solicitors for complainant.

45 In the United States Circuit Court for the District of Kansas.
In Equity.

FRANKLIN C. SMITH
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN R. R. Co. *et al.*, Defendants. } No. 3001.

And now comes said complainant, by Rossington, Johnston and Smith, his solicitors, and by consent amends his said bill of complaint by interlineation, as follows:

After the premises of said bill and before the prayer for relief insert the following: The said defendant, The Board of County Commissioners of Bourbon County, Kansas, sometimes pretend that the said Fort Scott, Humboldt and Western R. R. Co. was unable financially to complete the road-bed of said road, ready for the iron, from the the city of Fort Scott to the west line of Bourbon county, but your orator charges the facts to be that the said Board of County Commissioners of Bourbon County duly satisfied themselves that the said railroad company had resources which, with the said bonds provided for in said subscriptions, were sufficient and adequate to complete the said road-bed ready for the iron.

And said complainant further charges the fact to be that the said bonds provided for in said subscription were of themselves sufficient and adequate to complete the construction of the road-bed of said railroad, ready for the iron, from said city of Fort Scott to the west line of Bourbon county, and that the said county, by its neglect and refusal to perform the condition of the said subscription and to issue said bonds, deprived the company of the resources with which

to complete its said road and prevented it from obtaining the amount of other subscriptions conditioned upon its carrying forward said enterprise and caused and produced the total insolvency of said
46 railroad company, whereby said complainant, who had, upon the faith of the resources of said company involved in said subscription, taken and performed his said contract, was left without remedy save this equitable one of enforcing the performance of its duty upon the said Bourbon county.

ROSSINGTON, JOHNSTON & SMITH,
Sol'rs for Complainant

Endorsed: No. 3001. United States circuit court. Franklin C. Smith *vs.* Fort Scott, Humboldt and Western R. R. Co. & Com'rs of Bourbon County. Amended bill of complainant to his original bill of complaint. Filed Aug. 7, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy. Rossington, Johnston & Smith, complainant's sol'rs, Topeka, Kansas.

47 In the Circuit Court of the United States for the District of Kansas. In Equity.

FRANKLIN C. SMITH
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN R. R. Co. *et al.*, Defendants. } No. 3001.

Exceptions for impertinence taken by the said complainant to the answer of the said defendant, The Board of County Commissioners of Bourbon County, Kansas, and filed on the 3rd day of July, 1882.

First exception. Complainant excepts to all that part or paragraph of the answer beginning upon the first page of the same on the eighth line from the bottom of said page and ending at the twentieth line from the top of the second page of said answer with the word "thereof," for that the whole of said part or paragraph of said answer is impertinent.

Second exception. Complainant excepts to the paragraph of said answer beginning at the 20th line from the top of said second page and ending at the 40th line from the top of said second page with the words "at law," for that the same is impertinent.

Third exception. Complainant excepts to the paragraph beginning at the 40th line from the top of said second page and ending at the 4th line from the bottom of said second page with the word "herein," for that the same is impertinent.

Fourth exception. Complainant excepts to that paragraph beginning at the 4th line from the bottom of said second page and ending at the 7th line from the top of the third page of said answer with the word "contract," for that the same is impertinent.

Fifth exception. Complainant excepts to all that part or paragraph of said answer beginning at the 13th line from the top of the said

third page and ending at the 9th line from the bottom of the
48 9th page with the words "complaint herein," for that the same is impertinent.

Sixth exception. Complainant further excepts to all that part or paragraph of said answer beginning on the 13th line from the top of the last page of said answer and ending at the 21st line from the top of the last page of said answer with the word "complainant," for the same is important.

In all of which particulars the said complainant excepts to said answer and insists that the same is not responsive to said bill of complaint, and involves and contains no legal defense thereto to which complainant should join issue by replication or be put to the costs of the disproof of said averments.

Wherefore said complainant prays that all the matters and things in said answer hereinbefore excepted to should be expunged therefrom at the costs of said defendant.

ROSSINGTON, JOHNSTON & SMITH,
WILLIAMS & DILLON,
Solicitors for Complainant.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

FRANKLIN C. SMITH.
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN R. R. Co. *et al.*, De endants. } No. 3001.

It is hereby stipulated by and between Joseph D. McCleverty, the solicitor for the said Board of County Commissioners of Bourbon County, Kansas, and Rossington, Johnston and Smith, solicitors for the complainant, Franklin C. Smith, that the said complainant shall, for the purpose of speeding the cause, file his general replication to the answer of said defendant, The Board of County
49 Commissioners of Bourbon County, Kansas, but that the same shall be without prejudice to any exceptions, for impertinence or otherwise, which said complainant might have filed and prosecuted against said answer had he not replied thereto, and that said exceptions may be made and attached to this stipulation, but that the rights of complainant shall not be prejudiced by failure to take proof upon any part of said answer included within the terms of said exceptions.

It is further stipulated that the said parties to this suit shall proceed with the taking of testimony and endeavor to get this case in readiness for said submission at the November term, A. D. 1882, at which time the exceptions hereto attached shall be duly argued, and for this purpose it is specially stipulated and agreed that the same shall be originally submitted to the court for hearing without reference to a master, and that, upon the argument of said exceptions, it is agreed that their hearing and determination shall go to the admissibility and competence of all evidence which may have been there-

tofore taken in support of the averments of said answer, which are included within the terms of said exceptions.

ROSSINGTON, JOHNSTON & SMITH &
WILLIAMS & DILLON,
Compl't's Sol'rs.

J. D. McCLEVERTY,
Sol. for Def'ts, Board of Com'rs, &c.

Endorsed: No. 3001. United States circuit court. Franklin C. Smith *vs.* Fort Scott, Humboldt — Western R. R. Co. & the Com'rs of Bourbon County. Exceptions to answer of def't, The Board of County Comm'rs of Bourbon County, and stipulation. Filed Aug. 11, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy. Rossington, Johnston & Smith, compl't's sol'rs.

50 EXHIBIT "A." W. C. Perry, Notary Public.

Copy.

Pages of record, 19, 20, & 21.

FT. SCOTT, KANSAS, MONDAY, *June 19th*, 1871.

Pursuant to a published notice, as provided by the by-laws of the Ft. Scott and Allen County Railroad Company, a meeting of stockholders took place at the hour of six o'clock p. m. the day and date above stated.

There was two thousand eight hundred and fifty shares represented, as follows: By private subscription of citizens of Bourbon county, Kansas, one hundred and thirty shares (130); by Bourbon county, Kansas, one thousand and five hundred (1,500) shares; by Humboldt township, Allen county, Kansas, seven hundred and fifty (750) shares; by Salem township, Allen county, Kansas, two hundred and fifty (250) shares; by private subscriptions of citizens of Humboldt and Allen county, Kansas, two hundred and twenty (220) shares.

J. S. Redfield was select- to act as chairman, and S. A. Manlove, secretary.

On motion of S. A. Manlove, E. M. Hulett was authorized to cast the vote for the stock authorized by citizens of Bourbon county.

Mr. Hulett's name being called, he voted 130 shares for C. S. Redfield, B. P. McDonald, L. P. Foster, E. Jones, S. A. Manlove, Geo. A. Crawford, E. M. Hulett, D. B. Emmert, C. H. Pratt, S. H. Stevens, W. W. Curdy, C. C. Refield, and J. M. Bernard.

D. R. Cobb, having been selected by the Board of County Commissioners of Bourbon County, Kansas, to cast the stock of said county, voted one thousand five hundred shares for C. S. Redfield, L. P. Foster, E. Jones, S. A. Manlove, B. P. McDonald, Geo. A. Crawford, E. M. Hulett, D. B. Emmert, C. H. Pratt, S. H. Stevens, W. W. Curdy, J. C. Redfield, and J. M. Bernard.

Peter Long, who was selected by the citizens — Humboldt township, Allen county, Kansas, and by Salem township, Allen county, Kan-

sas, and by the various other stockholders of Allen county,
51 Kansas, voted as follows: Seven hundred and fifty shares of Humbolt township, two hundred and fifty shares for Salem township, and two hundred and twenty shares for the stock subscribed by citizens of Allen county for C. H. Pratt, J. M. Bernard, S. H. Stevens, D. B. Emmert, H. Redfield, W. W. Curdy, J. S. Redfield, S. A. Manlove, E. M. Hulett, Geo. A. Crawford, B. P. McDonald, E. Jones, and L. P. Foster.

The names last above recorded having received the unanimous vote of all the stock represented were declared the duly elected directors to serve for the ensuing year. The meeting of stockholders then adjourned to meet in the city of Ft. Scott on Saturday, June the 24th, for the purpose of electing officers and transacting such other business as may come before the board of directors.

The board then adjourned.

J. S. REDFIELD,
Chairman New Board.
S. A. MANLOVE, *Secretary.*

The old board of directors then convened as a board of directors and adjourned to meet on Saturday, June the 24th, 1871, at 3 o'clock p. m.

J. S. REDFIELD,
President of the Ft. Scott and Allen County Railroad Company.

Attest: S. A. MANLOVE,
Secretary of the Ft. Scott and Allen County Railroad Co.

EXHIBIT "B." W. C. Perry, Notary Public.

Copy.

Pages of record, 38 & 89.

STOCKHOLDERS' MEETING,
HUMBOLT, KANSAS, *Oct. 7th*, 1871.

Agreeable to published notice a stockholders' meeting was held. J. S. Redfield called the stockholders' meeting to order.
52 On motion of G. A. Crawford, J. S. Redfield was elected chairman of the stockholders' meeting and S. A. Manlove, secretary.

The following stock was represented: J. S. Redfield, twenty (20) shares; George A. Crawford twenty (20) shares; S. A. Manlove, twenty (20) shares; John G. Stewart, twenty (20) shares, by his five (5) proxy; J. S. Redfield, twenty (20); D. B. Emmert, twenty (20) shares. The following stock was represented by proxy: Watson Stewart, twenty (20) shares; P. Long, twenty (20) shares; S. P. Fossman, twenty (20) shares; Jas. Blythe, twenty (20) shares; W. W. Curdy, twenty (20) shares; C. H. Pratt, twenty (20) shares; W. Wakefield, twenty (20) shares; H. W. Sigroon, twenty (20) shares, and D. B. Emmert acted as such proxy; Bourbon county, fifteen thousand

shares (15,000), by David Gardner, chairman of the board of county commissioners of Bourbon county, Kansas; Humboldt township, seven hundred and fifty (750) shares, by G. De Witt, chairman of the board of trustees of said township; Humboldt City, two hundred and fifty (250) shares, by S. H. Stevens, president of the council and *ex officio* mayor of said city; Salem township, two hundred and fifty (250) shares, by J. H. Bernard, proxy for J. P. Spraul, chairman of the board of trustees for said township.

On motion, the following resolutions were adopted:

Resolved, That a committee of three be appointed to confer with the Ft. Scott, Humboldt and Pacific Railway Company with a view to consolidation.

Resolved, That the president and board of directors of this company take measures to have consolidated with this company the Ft. Scott, Humboldt and Pacific Railway Company without delay.

The chair appointed as such committee D. S. Emmert, S. H. Stevens, and George A. Crawford.

On motion of Mr. Crawford, the stockholders' meeting adjourned until eight o'clock.

53 STATE OF KANSAS, } ss:
Bourbon County, }

The State of Kansas to John G. Stuart, David Gardner, David R. Cobb:

You and each of you are hereby commanded to appear before the undersigned, a notary public in and for said county, at my office in said city, forthwith to give testimony in an action in which I am taking depositions, wherein F. G. Smith is pl't'ff and The Board of of County Commissioners of the County of Bourbon aforesaid and others are defendants, said action being now pending in the circuit court of the United States for the district of Kansas.

Hereof fail not under penalty of the law.

Given under my hand and official seal this 30th day of March, 1883.

[SEAL.] W. G. PERRY,
Notary Public.

Received this subpœna on the 30th day of March, 1883, and served the same on the same day by reading it to each witness within named.

J. R. CHEESMAN, *Constable.*

Fees:

Service	55
Mileage, 16 miles	1 60
Total	$2 15

Above fees paid by plaintiff.

J. R. CHEESMAN, *Constable.*

[Endorsed:] C. F. Smith *vs.* Com'rs Bourbon Co. *et al.* Subpœna.

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Stipulation.

In the Circuit Court of the United States in and for the District of Kansas.

FRANKLIN C. SMITH, Compl't,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOURBON, STATE OF KANSAS, *et al.*, Def'ts.

It is hereby stipulated by and between the parties that the depositions hereto attached were taken by agreement, and that
54 notice *and* time and manner of taking the same is waived; also all objection as to form; and it is also agreed that the officer taking the same is qualified, and that such officer need not formally certify the same.

G. C. LANPHERE,
Sol'r for Compl't.
J. D. McCLEVERTY,
Sol. for Board of Co. Com's of Bourbon Co., Kansas.

Whereupon, on this 30th day of March, 1883, depositions in the above-entitled action were taken as follows:

JOHN G. STUART, being duly sworn, deposes as follows:

Ques. 1. What is your name, age, occupation, and place of residence, and how long have you resided in Bourbon county, Kansas?

Answer. John G. Stuart; farmer; forty-eight years old; I reside in Scott township, Bourbon county, Kansas, & have resided in Bourbon county a little over twenty-five years.

Ques. 2. State whether you ever held any office in the city of Fort Scott, in said county; & if so, what office and when.

Answer. I was in the city council six years, and mayor in 1873 and 1874.

Ques. 3. State whether you are now a property-holder & tax-payer in said county.

Answer. I have no property in my own name at present.

Ques. 4. State whether you was one of the original incorporators of the Fort Scott and Allen County Railroad Company.

Answer. I was.

Ques. 5. Look upon the record book now shown you and state what the fore part of it, up to about page 60, purports to be.

Def't objects to the question because the book and the matter therein contained are the best evidence of what it purports to be, and the evidence sought incompetent.

55 Answer. The book is the proceedings of our organization, called the Fort Scott and Allen County Railroad Company.

Ques. 6. State who was the secretary of that railroad company during the first three years of its existence.

Answer. S. A. Manlove.

Ques. 7. Look on pages 19, 20, and 21 and state in whose handwriting the record is.

Answer. S. A. Manlove's, the then secretary of the Co.

Ques. 8. Look on Exhibit "A," now shown you, and state whether it is a correct copy of pages 19, 20, & 21 of said book.

Answer. Yes, this is a correct copy, and I attach it to this deposition as part thereof.

(To the papers, Exhibit "A," def't objects as incompetent.)

Ques. 9. Look on Exhibit "B," now shown you, and state whether it is a correct copy of pages 38 and 39 of said record book, and attach the same to your deposition as part thereof.

Answer. It is an exact copy, and I attach it to this deposition as part thereof.

(To the paper, Exhibit "B," def't objects as incompetent.)

[SEAL.] JOHN G. STUART.

Subscribed and sworn to before me this 30th day of March, 1883. My commission expires May 12th, 1883.

W. C. PERRY,
Notary Public.

W. C. WHITNEY, of lawful age, being duly sworn, deposes as follows:

Ques. 1. What is your name, age, residence, and occupation?

Answer. W. C. Whitney; 49 years old; residence, Humboldt; occupation, contractor.

Ques. 2. State whether you are the Whitney who was a
56 member of the firm of Ray & Whitney, who took a sub-contract under F. C. Smith to construct the road-bed of the Fort Scott and Allen County railroad.

Answer. I am.

Ques. 3. State what portion, if any, of said road-bed is now used for a railroad.

Objected to by def't as incompetent and immaterial.

Answer. Nearly all that portion of that road lying in Bourbon county, Kansas; that is my impression.

Ques. 4. State whether you have or have not been over that portion of the road now used as a railroad since its use for that purpose; and, if so, how many times.

(Same objection by def't as above.)

Answer. Eight times.

Ques. 5. State about how many miles of said road-bed so constructed by you is now so used.

(Same objection by def't as above.)

Answer. My impression is between 23 & 24 miles.

Ques. 6. State whether you, as such contractor, completed said road-bed.

(Same objection by def't as above.)

Answer. Yes; I did.

W. C. WHITNEY.

Subscribed and sworn to before me this 30th day of March, 1883. My commission expires May 12th, 1883.

[SEAL.] W. C. PERRY,
Notary Public.

By consent of parties the further taking of these depositions is adjourned to 9 a. m., M'ch 31st, 1883.

W. C. PERRY,
Notary Public.

SATURDAY, *M'ch* 31*st*—9 a. m.

The taking of these depositions is resumed.

DAVID GARDNER, being duly sworn, deposes as follows:

Ques. 1. What is your name, age, residence, and occupation?
57 Answer. My name is David Gardner; my age is seventy-seven years; my residence is at Fort Scott, Kansas; occupation, retired.

Ques. 2. How long have you resided in Bourbon county, Kansas?

Answer. About 23 years.

Ques. 3. State what offices you have held in said county, and at what times.

Answer. I was justice of the peace four years, somewhere about the close of the war; and county commissioner four years, I think from Jan'y 1868, to January, 1872; I am not positive as to dates.

Ques. 4. Was you chairman of the board of county commissioners during the time you were commissioner?

Answer. I was most of the time, but was away four months, during which time Mr. Cobb acted as chairman.

Ques. 5. Was you acting as chairman of said board in the month of October, 1871?

Answer. I think I was.

Ques. 6. State whether on or about the 7th day of October, 1871, you, as chairman of said board of county commissioners and as agent of said Bourbon county, Kansas, attended a meeting of the stockholders of the Fort Scott & Allen County Railroad Company at Humboldt, Kansas?

Objected to by def't as incompetent, asking for a conclusion, and because the records of said board of county commissioners is the best and only evidence of the power and capacity in which the witness acted, if he acted at all.

Answer. As to the exact date I have nothing to strengthen my memory, but I believe somewhere about that time that I attended a meeting of that kind; in reference to that agency my mind is not

clear; I suppose at the time that I had some kind of agency
58 or some reason for attending the meeting. It is perfectly clear, however, from the records that I had no agency of the kind—I mean the records of the county commissoners. I examined the records on yesterday and did not find any authority.

Ques. 7. Would you have attended that meeting as the agent of the county if you had not thought at the time that you was duly authorized to represent the county?

(Objected to by def't as incompetent and as assuming that the witness was acting as the authorized agent of the county when there is no evidence of that fact, and when the witness does not state that he had that authority.)

Answer. I can't say how that was. I am of the opinion that there was some talk between the county commissioners about the matter, and that I was advised to go over there and represent the county, as far as we had any interest; I can't be positive about that; it is ten or twelve years ago, and my memory is very treacherous. I want to say, right now, from the present stand-point, I wouldn't have done it without the written authority of the board.

Ques. 8. You were not at that time in the habit of acting under false pretences or representing yourself as the agent of the public when you were not, were you?

(Objected to by def't as impertinent, incompetent, and as assuming that the witness had represented himself as being the authorized agent of Bourbon county when there is no evidence of that fact, and when he does not pretend to have so acted.)

Answer. I don't think I was in the habit of doing anything on my own responsibility where the interests of the public were involved, or that I supposed I had some reason for doing it. What I
59 mean by that is this: As I had no written instructions to attend the meeting, from some conversation with the members of the board, I had got the idea that I was authorized to attend the meeting.

Ques. 9. Can you swear positively that you had no written instructions to attend that meeting—that is to say, do you distinctly recollect that you had no written instructions?

Answer. I distinctly recollect that I had no written instructions—that is, I do not recollect that I had any written instructions; it must have been because of verbal conversations with other members of the board that I attended the meeting, for the reason that there is no record of it.

Ques. 10. State whether you are a tax-payer and property-holder of said Bourbon county.

Answer. I am.

DAVID GARDNER.

Subscribed and sworn to before me this 31st day of M'ch, 1883.
My commission expires May 12th, 1883.

[SEAL.]

W. C. PERRY,
Notary Public.

JOHN G. STUART, being recalled by the complainant, further deposed as follows:

Question 1. State whether the incorporators of the Fort Scott and Allen County Railroad Company opened books of subscription to the capital stock of the company; and, if so, about what time.

(Objected to by def't as incompetent and because the books themselves would be the best evidence.)

Answer. There was books opened for subscriptions to the stock. I am not positive as to the date; I think, though, about 1871.

Ques. 2. Did you subscribe to said capital stock?

(Same objection by defendant as above.)

Ans. I did.

60 Ques. 3. Do you know where that subscription book now is?

Answer. I do not.

Ques. 4. How long has it been since you last saw it?

Answer. I don't know that I have seen it for the last ten years; I don't recollect that I have.

JOHN G. STUART.

Subscribed and sworn to before me this 31st day of March, 1883. My commission expires on the 13th day of May, 1883.

[SEAL.] W. C. PERRY,
Notary Public.

DAVID R. COBB, being duly sworn, deposes as follows:

Ques. 1. What is your name, age, residence, and occupation?

Answer. My name is David R. Cobb; my age is 59 years; my residence is in Marmiton township, Bourbon county, Kansas, and by occupation I am a farmer.

Ques. 2. How long have you resided in Bourbon county, Kansas?

Answer. About twenty-five years.

Ques. 3. State whether you have ever held any public office in said county; and, if so, where and what.

Answer. I was elected county clerk in 1859; held the office two years, from Jan'y, 1860, and was re-elected in 1861, and held the office till January, 1864. I was appointed probate judge by Governor Robinson in 1861 or 1862. I have been representative in the State Legislature two terms; have been justice of the peace. I also held the position of county commissioner two terms. I think I was first elected commissioner in 1868, and held four years, from January, 1869, if that is when I was elected.

Ques. 4. State whether you was a member of the board of county commissioners of said Bourbon county on June 19, 1871?

Answer. I was.

61 Ques. 5. State whether, as such commissioner and as the agent of Bourbon county, Kansas, you attended a meeting of the stockholders of the Fort Scott & Allen County Railroad Com-

pany at Fort Scott, in said county, on or about the 19th day of June, 1861.

(Objected to by def't as incompetent and because the record of the proceeding of the board of county commissions of said county is the best and only evidence of the appointment and authority of said agent.)

Answer. I attended such a meeting and voted for choice of directors of that company, but I couldn't say that I was appointed by the board as their agent, nor can I say under what circumstances I attended the meeting. My impression is that Mr. Gardner suggested that I should attend the meeting from the fact that my district was more interested in the railroad than the districts of the other commissioners.

Ques. 6. How many votes did you cast at that election for the directors?

(Objected to by def't for the reason that the records of the proceedings of that meeting, if there was one, are the best evidence.)

Answer. I don't recollect.

Ques. 7. Was it or not 1,500 votes?

(Objected to as above and also because leading and suggestive.)

Answer. I have no idea now of how many votes I cast. I presume if I was entitled to cast 1,500 votes I cast them. I want the impression to be that I was acting in good faith, and that I thought I was acting under the law.

Ques. 8. State whether you supposed or understood at the time that you was authorized to cast those votes for the county in the choice of these directors?

(Objected to by def't as asking for suppositions and not facts, incompetent, and because the authority of the witness, if any
62 he had, could be best and only shown by the records of the proceedings of said board of commissioners.)

Answer. I suppose I was authorized so to do.

Ques. 9. You acted in perfect good faith, did you not?

(Objected to by def't as incompetent, and as trying to inveigh the witness into declaration and not asking for facts.)

Answer. I did.

Ques. 10. State whether you are a property-holder and tax-payer in said Bourbon county, Kansas.

Answer. I am.

DAVID R. COBB.

Subscribed and sworn to before me this 31st day of March, 1883. My commission expires May 13th, 1883.

[SEAL.] W. C. PERRY,
Notary Public.

The above witness claimed his fees, amounting to $3.10, which were paid by compl't's solicitor. I also certify that David Gardner and John G. Stuart each claimed their fees, in the sum of $1 each, which were paid by the solicitor for the complainant. Said solicitor also paid the officers' fees for subpœnaing witnesses in the sum of $2.15, all of said fees aggregating the sum of $7.25.

W. C. PERRY,
Notary Public.

STATE OF KANSAS, }
County of Bourbon, } *ss:*

I, W. C. Perry, a notary public within and for said county, hereby certify that the foregoing depositions were taken by and before me pursuant to the stipulation thereto annexed, and that at the taking thereof the complainant, F. C. Smith, was represented by his solicitor, J. C. Lanphere, and the def't, The Board of County Commissioners of the County of Bourbon, State of Kansas, by its attorney and solicitor, J. D. McCleverty; I also certify that the wit-
63 nesses whose depositions are found herein were personally present, and personally signed their several depositions; that they were severally sworn by me as required by law, and that I read over to them their said depositions before they severally signed the same.

In witness whereof I hereto sign my name and affix my notarial seal this 31st day of March, 1883.

[SEAL.]

W. C. PERRY,
Notary Public.

My fees paid by comp't in the sum of $8.00, which, with other fees paid, make a total of $15.25 paid by compl't

Endorsed: No. 3001. Depositions of Stewart, Whitney, Gardner, & Cobb, with copies of company records.

64 *Creditors' Bill.*

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States in and for the State of Kansas.

FRANKLIN C. SMITH
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY and The Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas.

I, R. C. Hunt, a notary public in and for the county of Knox, in the State of Illinois, do certify that on this 25th day of September, A. D. 1882, I was attended by G. C. Lamphere, solicitor for the above-named Franklin C. Smith, and J. D. McCleverty, solicitor for the Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, and the above-named F. C. Smith, a wit-

ness on behalf of himself, of lawful age, who, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Interrogatory 1. What is your name, age, residence, and occupation, and are you the complainant in this suit?

Ans. 1. My name is Franklin C. Smith; age, fifty-seven years; occupation, railroad contractor; residence, Galesburg, Illinois, and I am the complainant in this suit.

Interrogatory 2. What has been your occupation during the last thirteen years, and where have you resided during that time?

Ans. 2. My business for the last thirty years, mainly public works—building railroads and canals. A portion of the time I have been engaged in the practice of the law. I have resided during that time in the State of New York and in Knox county, Illinois.

65 Int. 3. State whether you and one John Dunn, by the firm name of F. C. Smith & Co., contracted to build a railroad bed from Fort Scott to Humboldt, in Kansas; and, if yea, state at what time and place, and with what company, and the pay that you were to receive.

Ans. 3. We did contract to build a railroad bed, ready for the superstructure, from Fort Scott, Bourbon county, Kansas, to Humboldt, Allen county, Kansas, in June, 1871, at Fort Scott, Kansas, with the Fort Scott and Allen County Railroad Company, which company was subsequently changed in name to the Fort Scott, Humboldt and Western Railroad Company. I was to receive the pay therefor, in the bonds of Bourbon county, Kansas, one hundred and twenty-five thousand dollars; the bonds of Humboldt township, Allen county, Kansas, the sum of $75,000; the bonds of Humboldt City, same township and county, the sum of $25,000; the bonds of Salem township, Allen county, Kansas, the sum of $25,000; $25,000 in Ellsmore township bonds, same county, if voted; if not, then the same amount in other township bonds of like character and value, making a total of $275,000 municipal bonds, at their par value.

Int. 4. State what was the estimated cash value of those bonds at that time.

Ans. 4. I estimated the value of their bonds at sixty cents on the dollar. I could not hypothecate them in the Eastern money market at over forty cents on the dollar previous to and at the time I entered into this contract. Soon after the execution of this contract of which I have spoken the supreme court of the State of Kansas announced its decision upon the question of the constitutionality of railroad aid bonds, deciding in favor of the constitutionality of railroad bonds voted under the law of 1868; in other words, declaring the statute of Kansas of 1868 constitutional, which materially increased the market value of the bonds spoken of.

66 Int. 5. State who constituted the officers and directors of the Fort Scott and Allen County Railroad Company at that time and where they respectively resided.

Ans. 5. Doctor J. S. Redfield, of Ft. Scott, was president; D. B. Emmert, of Humboldt, was vice-president; Sam. Maulove, of Ft. Scott, according to my recollection, was secretary. My recollection

is that the directorship was composed of thirteen, seven of whom represented Bourbon county and six represented Humboldt township, Humboldt City, and Salem township, Allen county, Kansas. Benjamin McDonald, Doctor Redfield, and, I believe, Sam. Manlove, were among the directors representing Bourbon county, and, I think, a man by the name of Scott, but am not positive. David B. Emmert, James Pratt, & Mr. McCurdy were among the directors representing Humbolt; I don't remember the man's name who represented Salem township, but think it was Palmer. E. M. Hulett, of Ft. Scott, was also an acting director at that time.

(The defendant, Commissioners of Bourbon County, Kansas, objects to all that part of the above answer which undertakes to state that certain municipalities were represented by certain directors as incompetent, for the reason that that could only be shown by the records of said municipalities.)

Int. 6. State whether you at that time became acquainted with the members of the board of county commissioners of Bourbon county, Kansas, and of other officers of said county, and, if yea, give their names.

Ans. 6. I was introduced to a man by the name of Gardner and a man by the name of Cobb as members of the board of county commissioners, as I recollect, and a third man, whose name I have forgotten. I think Mr. Samuel Manlove held the office of recorder or some county office at that time, but am not absolutely cer-
67 tain about that, but that is my impression. I was introduced to another man, an officer of the county, but whose name I do not now remember; he had some connection with the records of the county, I think.

Int. 7. State whether you saw, at that time or about that time, this Mr. Gardner and Mr. Cobb and the other person of whom you speak as a member of the board sitting together and acting as a board of county commissioners, and whether these men were introduced to you as the board of county commissioners for Bourbon county, Kansas.

Ans. 7. They were introduced to me as members of the board of county commissioners; whether they were sitting formally as a board of county commissioners I do not know. I never saw them sitting in a room, except in connection with the directors of the Fort Scott and Allen County Railroad Company; I suppose they were present as the board of county commissioners.

Int. 8. State whether you ever resided in the State of Kansas, and when you first visited Ft. Scott, in said State.

Ans. 8. I never resided in Kansas. I arrived in Humboldt, I think, on June 3, 1871, and left Humboldt for Ft. Scott over the line of this contemplated railroad the next day; arrived at Ft. Scott that evening, and the next day we agreed upon the terms of this contract, which was executed the day following; this was my first visit to Ft. Scott or the State of Kansas.

Int. 9. State what were the apparent resources of said railroad company at the time you made your said contract with it.

Ans. 9. It was represented to me that Bourbon County, Kansas, had voted the sum of $150,000 in bonds of the county, to draw seven per cent. interest, payable in thirty years; the town of Humboldt, the
68 sum of $75,000; the city of Humboldt, the sum of $25,000; the town of Salem, Allen county, Kansas, the sum of $25,000 in bonds. In addition to that, the directors had a written guarantee, signed by numerous citizens of the city and town of Humboldt, some sixty in number, I think, agreeing that in case that Ellsmore township refused to vote the sum of $25,000 in bonds that they would make good that amount either in bonds of Humboldt township or bonds of like character; that they also had individual subscriptions to the amount of about $10,000, making an apparent capital of $310,000 for the building of this road.

Int. 10. State what it was worth in cash at the time you made your contract to grade and tie the road-bed, including culverts and bridges, ready for the iron, from Ft. Scott to the west line of Bourbon county, on route on which you made the road-bed.

Ans. 10. It was about eighteen miles from Ft. Scott to the west line of Bourbon county. Three thousand dollars a mile would be a liberal price for grading to the west line of that county; that covers the grading of the eighteen miles. The culverts and bridges at an estimate of $500 a mile or $9,000. There was not many bridges to construct—less than usual—on that distance of road. The ties—some roads are satisfied with 1,700 to the mile, some demand 2,600; 2,600 is a full-tied road; that furnishes ties for side tracks and switches. In 1871 I could have purchased ties at 40 cts. a piece along the line of that road sufficient, in my judgment, to have tied the road. At 2,300 ties for a mile, at 40 cts. each, would come to $920 a mile. At 2,600 ties to the mile it would cost $1,040 to the mile, or $18,720 for the eighteen miles, or $81,720 for grading, bridging, and tieing the road from Ft. Scott to the west line of the county.

Int. 11. State what, if any, money or bonds you have been
69 paid by said railroad company upon said contract.

Ans. 11. I was paid $75,000 of Humboldt township bonds and $25,000 of Humboldt city bonds; that is all.

Int. 12. State whether the said railroad company, at the date of your said contract, had any other resources or other means of paying you for the work to be so performed by you than the subscriptions named above; if yea, state what they were.

Ans. 12. They had not.

Int. 13. State upon what you relied for payment under your contract.

Ans. 13. I relied entirely upon the pledge of these municipal bonds that I have mentioned in my former answers.

Int. 14. State whether, at the time you made your said contract, you had any conversation or conversations with the then board of county commissioners of said Bourbon county in regard to the said subscription of said county to said railroad company and the issue of its bonds in payment of said subscription; and, if yea, state fully

and particularly what you and the members of said board said upon that subject.

(Objected by same defendant to this question as incompetent and immaterial.)

Ans. 14. I had a conversation with at least two members of the board of county commissioners on the day we were considering and agreeing upon the terms of the contract. Mr. Redfield introduced me to two men—one Mr. Gardner, and I think the other's name was Cobb; at least, two men who claimed to be members of the board of county commissioners—I think their names were Gardner and Cobb.

The contract that we were considering provided first for the construction or grading of that portion of the road between the
70 L., L. and G. railroad, in Humboldt, and the M., K. & T. railroad, a distance of one and a quarter miles apart, for which they were to pay me a certain amount of Humboldt bonds. The second paragraph of said contract provided for the grading of that portion of the road between Ft. Scott and the west line of Bourbon county. The question arose as to the time of the delivery of a portion of the Bourbon county bonds. I desired a provision in the contract that a portion of said bonds should be delivered at stated intervals during the progress of the work between Ft. Scott and the west line of the county. To ascertain when the county commissioners would be ready to deliver the bonds Dr. Redfield and myself retired from the room in which the board of directors were in session for the purpose of conferring with the county commissioners. We retired to the Wilder House sitting-room. He went out and brought in those gentlemen and introduced them to me as members of the board of county commissioners, and one of them as chairman of the board. I asked them as to the amount of bonds that the county had voted and as to the manner of voting them, and whether they had taken the advice of an attorney in taking the preliminary steps. They said they had consulted with Mr. McComas, and that there was no possible doubt of the legality of the bonds of Bourbon county. I said to them I was a stranger in their State, unacquainted with their laws, and did not want to take any risk of taking bonds unless they were legally voted. They assured me that the law had been strictly followed, so far as they were advised. They said that the people of the county were very much interested and in favor of the building of that road, referring to quite a large street meeting that had been held in the street the evening previous, as an evidence of the manner in which the road was held. I asked them, further, as to the time of the delivery of their bonds, or if they were willing to get them in readiness and put them in escrow. They said
71 they were willing to do that, but did not think it was necessary. They would deliver the bonds to me direct in installments, as I might desire them, as soon as I had a good force of men at work on that portion of the line of road. They did not want that provision put in the contract for the reason that it might give some enemies of the project grounds for censuring them, but when I had got a good force of men along that portion of the line there would

be no opposition and they would deliver the bonds. The opposition that he spoke of was confined to a very few persons in Ft. Scott, who were opposed to all improvements on account of the necessary taxation. Relying upon that assurance, I went back with Mr. Redfield and we completed the contract.

Int. 15. This Mr. Redfield mentioned by you in the close of your answer was the president of the railroad company?

Ans. 15. He was president.

Int. 16. These two persons you were introduced to as Mr. Gardner and Cobb by the president of the road as members of the board of county commissioners. Did you have any conversation with them afterwards or know them afterwards, or members of that board?

Ans. 16. I saw them occasionally afterwards; had conversations with them on one or two occasions, especially Mr. Gardner, and talked with them as such county commissioners; knew nothing to the contrary; talked with them as to the progress of the work.

Int. 17. State whether you made any application for the bonds; and, if so, to whom, and what replies were made.

Ans. 17. After the completion of the work I applied for the bonds on two different occasions; they were not delivered. I made application to the county commissioners. The first reply was that there was a disagreement as to who the bonds belonged to, and the
72 next reply was that the bonds were not legally voted, or something of that kind.

Int. 18. State what is meant by the reply as the disagreement as to who the bonds belonged to.

Ans. 18. Soon after the completion of the work there was a disagreement between myself and my sub-contractors, Ray and Whitney, as to the amount that was due them and myself, which was subsequently settled.

Int. 19. And you understood then, or you mean to say, that the bonds were withheld until you and Ray and Whitney, your sub-contractors, should agree as to which should have the bonds?

Ans. 19. Yes, sir; that was in the first instance; subsequently they were withheld on the ground that they were not legally voted.

Int. 20. In any of those conversations that you have last referred to did the board object to deliver the bonds upon the ground that the contract was not completed or that the road-bed was not completed ready for the iron to the west line of Bourbon county?

(Objected to by same defendant as leading.)

Question 20 withdrawn.

Int. 20. In any of these conversations last referred to did the board refuse to deliver the bonds upon any other ground or for any other reason than you have mentioned in your last two answers? And, if so, state what grounds or reasons.

Ans. 20. No, sir; they did not.

Int. 21. State whether at the time you made your said contract the said board knew of the nature, terms, and conditions of your contract with the railroad company, and how you were to be paid; and, if yea, your means of knowledge.

Ans. 21. They knew it—the main features of my contract—those men I talked with, I mean. I saw them present in the room
73 where myself, officers, and directors of the road were conferring about the contract, and I talked with them generally of the terms of the contract.

Int. 22. Did you have any conversations with any other county officers before you made your contract in regard to the subscription of said county and the issuing of its bonds? If so, with whom and what was said?

Ans. 22. I had a conversation with Samuel Manlove; my understanding was he held a county office. I do not remember that I had any *considerations* with any other county officers than I have stated. He stated that the bonds of Bourbon county were good beyond any question; that the road was a popular road with the people of that county and they would willingly be taxed to pay them —in substance.

Int. 3. State whether you had any conversations with the people of the county generally before making said contract; and, if so, what was said by them.

Ans. 23. I had conversations with quite a number of people. All that I talked with seemed pleased with prospect of getting the road. The night before the making of the contract they had quite a large public meeting, at which appeared quite a popular demonstration in favor of the road.

Int. 24. Was or not this meeting called and held for the purpose of giving expression to the public sentiment on the building of the road?

Ans. 24. It seemed to be a demonstration of the people without any regular call. It was noised about that the officers of the railroad company were about making a contract for the construction of the road. This seemed to be a meeting together of the people, of joy and gladness that the prospect of the road was so good; speeches were made in its favor and applauded.

Int. 25. Would or not you have made this contract with the
74 company if you had not received this encouragement from the Board of County Commissioners and other citizens of that county?

Ans. 25. I should not have made the contract had it not have been for the assurance I received from the county commissioners and directors, representing or claiming to represent Bourbon county, that the proposed bonds of Bourbon county were legally voted, and the assurance that I received from the members of the board of county commissioners that those bonds would be delivered to me as I might need them during the progress of the construction of the work.

Int. 26. State what is the meaning among railroad men and railroad contractors of the words "complete the road-bed ready for the iron."

Ans. 26. I understand it to mean ready for the superstructure, ties, and iron; I have always so understood it, and have talked with a great many contractors and engineers, and that was their understanding.

Int. 27. State whether the road-bed of said road from Ft. Scott to the west line of Bourbon county was completed ready for the iron on the first day of June, 1872.

Ans. 27. It was.

Int. 28. State what was due you from said company or said contract December 13th, 1879.

Ans. 28. $267,113.19.

Int. 29. State whether any plat and profile of said road was ever filed in the recorder's office of said Bourbon county.

Ans. 29. I will state that my engineer, Mr. Kingsbury, made a profile and a map of said road and I took them with him in my buggy to Ft. Scott, and he started to go to the recorder's office with them. I afterwards saw the map in one of the rooms near
75 the court-house occupied by Mr. Manlove; that is all I know about that.

Int. 30. Do you know anything about the said company's having obtained the right of way?

Ans. 30. I know that the railroad company obtained the possession of the entire line from Ft. Scott to Humboldt, and a considerable portion of the right of way.

Cross-examination by J. D. McCleverty, Esq., solicitor for the Board of County Commissioners of Bourbon County, Kansas:

Cross-int. 1. Does the amount stated by you as due Dec. 13, 1879, mean the amount in the bonds you have been talking about or actual cash values?

Ans. 1. It means the amount due in bonds upon the completion of the contract and interest from that time up to Dec. 13th, 1879.

Int. 2. Do you mean to say that the words to "complete the construction of the road-bed ready for the iron" is and means to "complete the road-bed ready for the ties?"

Ans. 2. I do.

Int. 3. Have you mentioned all of the conversations had between you and the persons whom you have named as members of the board of commissioners of Bourbon county, and have you stated substantially all that was said in those conversations?

Ans. 3. I may have had conversations with members of the board of commissioners upon other topics at other times.

I have stated in substance all that was said on the topic mentioned and all I remember of the conversations now.

Int. 4. You speak of certain members of the board of county commissioners being present at the time you and the directors of the railroad company were discussing the terms of the
76 proposed contract. Were these the Mr. Gardner and Mr. Cobb to whom Dr. Redfield had introduced you that day?

Ans. 4. They were the same men, but I am not certain that the introduction had occurred when I saw them there.

Int. 5. Is it not the fact that they were not present until after Dr. Redfield and you had consulted with them at the Wilder House,

and that this consultation was arranged by Dr. Redfield sending for them that you and him might meet them at the Wilder House.?

Ans. 5. That may possibly be so. I am not able to say whether it was before or after the introduction that I saw them in the room. I think now Dr. Redfield did inform me that he had sent for them.

Int. 6. Is it not also the fact that after you and Dr. Redfield had met them at the Wilder House Dr. Redfield invited them to go with you and him to the place where the board of directors was in session, and that this was the first and only time that you saw any of the members of the county board present at a meeting of the board of directors?

Ans. 6. I do not recollect Dr. Redfield inviting them. He may have done so. I am not able to state that I saw them present with the board of directors in the room only the one time I have mentioned; whether it was before or after the introduction I cannot positively state; very likely it was after.

Int. 7. The subsequent conversations you mention with Mr. Gardner especially, and possibly with other persons who were members of the county board, other than the two times when you say that you made demand for the issuance of the bonds after you had completed the work on your contract—please state when such subsequent conversations were held, where, and under what circumstances.

Ans. Those subsequent conversatiens were casual conver-
77 sations, as I met the parties on the street.

Int. 8. You have stated that you had conversations with reference to the matter of these bonds with different residents of Ft. Scott and Bourbon county, who gave you encouraging assurances. Did you also have a conversation upon this subject with the colored waiters at the Wilder House?

Ans. 8. I did not know they had any colored waiters.

Int. 9. How soon after making your contract did you commence work under it?

Ans. 9. I sublet the work within a week from the date of my contract; the subcontractors commenced operations within a very few days; I would say the ground was broken within ten days or two weeks after the contract was signed.

Int. 10. Was not this contract and all rights accruing under it assigned by you to Ray and Whitney before the work was completed under it, and such assignment ratified and accepted by the railroad company at or about the time it was assigned?

Ans. 10. I never made any assignment of the contract to Ray and Whitney.

Int. 11. Did you at any time assign such contract to any person or persons; if so, when and to whom, or any rights accruing thereunder?

Ans. 11. Not any that I am aware of; I have executed a power of attorney to John C. Stewart and Judge Lamphere to enforce the claim. I am not aware that that carried any assignment with it. I think that was in 1873.

Int. 12. Who, if any one, is interested with you in the result of this suit; what is the nature of their interest, if any?

Ans. 12. No one, except as my attorneys.

78 Int. 13. Do not Ray and Whitney, or one of them, have an interest in this suit? And, if so, state fully in that regard.

Ans. 13. I owe Ray and Whitney, as subcontractors, over $100,000 of these bonds that is due from the railroad company for grading this road, which I expect to pay them if recovered.

Int. 14. If you at any time assigned this contract or any rights thereunder to Ray and Whitney, or either of them, has it ever been reassigned to you?

Ans. 14. I have never assigned it to them or either of them, nor any rights thereunder, nor has the same been reassigned to me that I am aware of, and if it had been done I would very likely be aware of it.

Int. 15. How long did you remain in Ft. Scott or Kansas at the time of your first visit there in 1871?

Ans. 15. I remained from the first of June, I think, till the forepart of August, then I returned to New York and was gone about a week, when I returned to Kansas, and then I remained in Kansas until November—I think, the 11th—when I went to New York again and returned to Kansas about the first of March. I remained there about one month, when I came to Knox county, Illinois, and remained here until some time in May, when I went back to Kansas, and then I remained until August, when I returned to this county; went back to Kansas in November and remained two or three weeks, and, I think, I returned and went back again in February; not sure it was as late as February. I think my return from my last trip to Kansas was in April, 1873, and I have not been back since.

Int. 16. Was not this contract with the railroad company executed in writing; and, if so, have you the original, and will you attach it to this deposition as a part thereof?

79 Ans 16. It was and is in writing. The original is in the hands of my attorneys; with the permission of my attorneys I will attach it to this deposition as a part thereof.

(Here solicitor for said defendant above named demands that said original contract be hereto attached as a part hereof.)

Int. 17. Did you not write to the Mr. E. M. Hulett you have mentioned since the commencement of this suit that the amount due you personally was $20,000.

Ans. 17. No, sir.

Int. 18. Paper is presented witness and he is asked to state if he will attach this as a part of this deposition and if said paper was written and signed by him.

Ans. 18. I will attach it to my deposition, and I wrote and signed it. Said paper is hereto attached, marked "Exhibit A."

Int. 19. You mention Benjamin McDonald, Dr. Redfield, Samuel Manlove and others, who you say represented Bourbon county in the directory of the railroad company. Do you undertake to state as a fact that they represented the organization known as Bourbon county, Kansas, or do you mean by the expression used by you merely to say that they resided in Bourbon county?

Ans. 19. I mean to state that I was informed by the officers of the road that they were among the directors representing Bourbon county. There were other men from Bourbon county, whose names I have forgotten.

Int. 20. Was this all that was said to you upon this subject, and by whom was it said?

Ans. 20. It is not all. Dr. Redfield, David Emmert, Mr. Hulett and McDonald, Mr. Manlove. They informed me that Bourbon county, by virtue of its $150,000 stock subscribed, was entitled to a majority of the directory, and had, I think, seven of the thirteen directors.

80

Int 21. Did you not know it to be a fact that these gentleman just named by you were directors in that railroad company from its first organization; that they organized the company mainly for the purpose of obtaining this subscription from Bourbon county, hoping thereby to build the road, and that they continued as directors during the whole time of the existence of the company?

Ans. 21. I did not.

Int. 22. Do you know who the individual subscribers were to the capital stock of this railroad company, and what information did you have on that subject?

Ans. 22. I was informed who they were, but I have forgotten, except one man, D. B. Emmert.

Int. 23. Were not these individual subscriptions confined exclusively to the directors, and were not the amount of those subscriptions exhausted in outside expenditures of the railroad company?

Ans. 23. I cannot state.

Int. 24. Were not the subscriptions by municipalities in Allen county voted upon the condition that the proceeds and amount thereof should be expended in that county?

Ans. 24. Not that I am aware of.

Int. 25. Was not also a condition as to the municipal subscriptions from Allen county, or a part thereof, that the amount should not be paid until the road was completed through them, respectively?

Ans. 25. My understanding was that they were voted in accordance with the statute governing township and city bonds. I am of the impression that they were not deliverable under the law until the road was in running order through the township or completed between the points designated in the proclamation calling an election upon the bond question, and that was my understanding as to the conditions.

81

Int. 26. Did not the decision of the supreme court of Kansas holding that aid voted or a subscription voted to railroad companies by municipalities in Kansas were void unless the particular railroad corporation was in existence and named in the order submitting the particular proposition to a vote of the people have a depressing effect as to the value of aid voted or subscriptions attempted to be authorized where the corporation was not named in such order of submission?

Ans. 26. It must have depressed the value of all said bonds voted

without naming the corporation to which the aid was intended. But I will state that at the time I entered into this contract the supreme court of Kansas had made no such decisions, and I will state farther they made that decision the year after I had completed my contract.

Int. 27. When did you receive the $75,000 of Humboldt township bonds and the $25,000 of Humboldt City bonds mentioned by you?

Ans. 27. On or about the 11th day of November, 1871.

Int. 28. What was their cash value at that time?

Ans. 28. Nothing; I offered to sell them at thirty-five cents on the dollar, but in January following—that is, 1872—I sold a small amount at forty-five cents on the dollar; in February I sold the balance of the portion I had retained for fifty and fifty-two cents on the dollar.

Int. 29. Did you at any time obtain copies of the record of proceedings of the vote of these bonds of the different municipalities; and, if so, when and of which ones?

Ans. 29. A portion of them; I think that I procured a copy of the proceedings of Salem township, Humboldt township and
82 city soon after the completion of the work under my contract; I don't think that I ever got a copy of the record of Bourbon county until Mr. Stewart and Judge Lanphere went out there in 1873 as my attorneys and got it; I examined the records soon after I entered into contract of the proceedings up to and including the vote in all of the places.

Int. 30. About when, as near as you can fix the date, did you make this examination?

Ans. 30. I would think it was in July, 1871, but my attention was directed mainly to the proclamation and the record of the vote.

Int. 31. Can you give the name- of any parties who proposed to contract for the delivery of any considerable quantity of fair, marketable railroad ties, distributed along the line of that road, at the price of forty cents apiece?

Ans. 31. The names of persons now has gone from my mind, but there were several men between Uniontown and the head of Tennison creek and along the Marmaton river who were desirous of furnishing ties. The names I do not recollect. One gentleman proposed to deliver ties at thirty cents each; but my contract did not cover the ties, therefore I was not very particular about that matter.

Int. 32. Is it not a fact that you did try to make contracts for the purchase and delivery to you of ties along that road, and is it not also the fact that there was but very little tie timber on that route, and that good marketable ties were worth there from sixty to seventy cents apiece.

Ans. 32. I did contract for ties for the west end of the road about one mile and a quarter, that portion of the road between the L., L. & G. and the M., K. & T. in Humboldt township. I purchased
83 white oak ties for forty-five and fifty cents; some black walnut at forty cents, at that end of the line. Tie timber was very scarce. That was the price I paid delivered along the line. At the east end, along the valley of the Marmaton river and from Ft.

Scott to the west line of Bourbon county, tie timber was more plenty. I made no offers to purchase ties except on this mile and a quarter at the west end. I am not prepared to state that the west twenty miles could have been tied for less than sixty cents, but a great many could have been bought at 45 and 50 cents.

Redirect examination by Judge Lamphere, of counsel for complainant:

Int. 1. State whether after you completed your contract and at what time you had a conversation with a party as to the cost of placing ties upon that line; if so, under what circumstances, what was said, and who the gentleman was.

Ans. 1. A Mr. Shepherd, who entered into contract with this railroad company for ironing and equipping this road, made frequent trips over the line from Humbolt to Ft. Scott with me. His attention was directed particularly to procuring ties for the road. I was present with him on several occasions when he had conversations with persons who professed to own timber, and heard the price of ties frequently spoken of; my information and opinion as to the value of ties was formed from that circumstance. He had frequent offers in my presence from those persons for the delivery of ties at 30 and 40 cents a piece; those conversations were in July and August, 1871.

Int. 2. What amount of bonds at their par value did you pay to Amsden and Ward, subcontractors, for their work on this road?

Ans. 2. I paid to those gentlemen $77,000 in bonds the day they were delivered to me.

84 Int. 3. State what amount you expended of your own means, aside from bonds received by you.

Ans. 3. I expended in the neighborhood of $20,000 of my own means over and above the proceeds that I received from the bonds spoken of; in other words, I spent all the money I had in the world.

Int. 4. State what amount is claimed by Ray and Whitney, subcontractors, for their work on said road.

Ans. 4. They claim $125,000 of these bonds. I expect to pay them every dollar I owe them, if I ever get it.

Recross:

Int. 1. Were not the quality of ties Shepherd was talking about much below the grade of what might be classed as good marketable ties?

Ans. 1. I think they were below what would be termed first-class ties. I don't think they were much below what new roads generally put down.

Int. 2. When did you first learn of the foreclosure and sale of this road by Carter under his mortgage.

Ans. 2. I don't know that it is true now. I have heard it reported some months after it was said to have taken place; it was my impression I heard of it the next year after it was said to have been done; soon after hearing of it I filed a bill for a mechanics' lien in the same court in which this suit is pending.

Int. 3. Through or from whom did you obtain this information in reference to Carter's foreclosing his mortgage.

Ans. 3. I think from Mr. T. S. Frost, of Chicago, Ills., a former attorney of mine, but now dead.

F. C. SMITH.

I, R. C. Hunt, a notary public, as stated in the caption on this deposition, by agreement of the parties, took the deposition
85 of the said F. C. Smith, the witness whose name is subscribed to the foregoing deposition, and before the commencement of his examination as a witness in the said suit between the said Franklin C. Smith, plaintiff, and the said The Fort Scott, Humboldt and Western Railroad Company and the Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, he, the F. C. Smith, was duly sworn by me to testify the truth in relation to the matters in controversy between said parties, so far as he, the said F. C. Smith, should be interrogated concerning the same; that the said deposition was taken at the office of Lanphere & Brown, in the city of Galesburg, county of Knox and State of Illinois, on the 25th day of September, A. D. 1882, by agreement of counsel for the parties, and that after said deposition was taken by me as aforesaid the interrogatives and cross-interrogatives and the answers thereto, as written down, were read over to the said F. C. Smith, and that thereupon the said deposition was signed and sworn to by said F. C. Smith before me at the place and on the day last aforesaid.

R. C. HUNT,
Notary Public.

N. P. fees	$14 53
Postage	15
Total	$14 68

Rec'd my fees of complainant.

[SEAL.] R. C. HUNT, *N. P.*

"EXHIBIT A." R. C. H., N. P.

GALESBURG, KNOX CO., ILL., *August 27th*, 1880.

E. M. Hulett, Esq., att'y & councillor, &c.

DEAR SIR: I learn from Mr. Stewart that you represent the county of Bourbon in this case of F. C. Smith *vs.* The Ft. Scott, Humboldt & W. R. R. & Bourbon Co.

You are familiar with all the circumstances connected with my taking of that contract and something probably of the rascally
86 & fiendish attempts of my Humboldt friends to swindle me out of everything I had in prospect in that contract, as well as all that I had expended of my own means and that of my friends—a more infamous outrage was never attempted in any half-civilized community—but that is now of no consequence. My object in writing to

you at this time is to inquire if your clients are without a sense of justice. You know that I am entitled to some consideration; that I went out to Kansas in good faith to grade the road in accordance with my contract, and it was done; that I expended in engineering about $20,000 over and above what I received from the company. Every dollar I had in the world, and about $3,000 of money I borrowed from friends was sunk in that road, and since my return from Kansas my home had to be sold, and I was turned out penniless, the accumulations of my life swept away, and the blow so crushed me in spirit that I have not yet arisen to my normal condition. I am now old enough to retire from the life struggles, but my family depend upon my earnings for support. Now, these are the exact facts, and I want to know if your people feel like continuing the fight or whether they would be willing to pay, and, if so, how much, to end the controversy and give me a chance to settle my affairs while living.

An early reply is solicited.

Yours, &c., F. C. SMITH.

Deposition of compl't.

87 Contract and agreement made and executed this 6th day of June, 1871, by and between the Fort Scott and Allen County Railroad Company, State of Kansas, of the first part, and F. C. Smith and John Dunn, partners as F. C. Smith & Co., of Wyoming county, New York, of the second part, witnesseth:

That the said party of the second part, for and in consideration of the sum of two hundred and seventy-five thousand dollars in bonds of Bourbon county, Kansas, and in bonds of the city of Humboldt, and various townships of Allen county, Kansas, to be received at par by the party of the second part, to be paid at the times and in the various amounts hereinafter mentioned, do hereby stipulate and agree to grade a railroad bed from the city of Fort Scott, Bourbon county, Kansas, beginning at some point to be designated by the party of the first part on the north or west side of the Marmaton river, adjoining said city, and running to and through the city of Humboldt, Allen county, Kansas, to the line of the Missouri, Kansas & Texas railway to a point not exceeding one-fourth of one mile from the present depot of said M., K. & T. Railway Co., at said city of Humboldt, to construct good and substantial railroad bridges over and across the Neosho river and over and across all streams on the line of said Fort Scott and Allen county railroad; also to construct all necessary culverts, water-courses, ditches, and cattle-guards on the line of said road. It is stipulated and agreed by the parties hereto that the location of said road shall not vary more than one mile from the route of the preliminary survey of said road, as made by Capt T. I. Hurd without the consent of the parties of the first part, and shall run not more than one-half mile from Uniontown, nor more than one mile from Marmaton City.

That said road-bed shall be, on all embankments four feet high and under, ten feet wide; on all embankments over four feet
88 high and under twelve feet high, twelve feet wide; on all

embankments over twelve feet high, fourteen feet wide. All cuts shall be sixteen feet wide; all earth slopes to be one and one-half feet horizontal to one foot vertical.

All rock slopes to be one-fourth of one foot horizontal to one foot vertical; said road-bed to have a maximum grade of not over sixty feet to one mile. All culverts and water-courses to be made of rubble masonry laid dry; cattle-guards of wood. It is further stipulated and agreed that said parties of the second part shall defray and pay all expenses of engineering connected with the location and construction of said road-bed, bridges, culverts, water-courses, and cattle-guards; that all of said work shall be fully done and completed in a good and substantial and workmanlike manner on or before the 30th day of June, 1873. All the culverts, water-courses, ditches, and cattle-guards on said road-bed shall be located and their sufficiency determined by the chief engineer of the party of the first part in connection with the engineer of the parties of the second part, and in case of a difference of opinion between said engineers on any such question they shall select some competent disinterested third party, who shall determine the matters.

For and in consideration of the foregoing stipulations and agreement to be done, executed, and performed by said parties of the second part, and the acceptance thereof by the party of the first part, the said party of the first part, its successors and assigns, do hereby stipulate and agree to pay to said party of the second part thirty thousand dollars in bonds (at par) of the city of Humboldt, Kansas, and township of Humboldt, Kansas, upon the completion of said road-bed, and its acceptance as aforesaid by the parties of the first part, from the Mo., Kan. and Texas Railway Co. line
89 to the line of the Leavenworth, Lawrence and Galveston Railroad Co.'s line and the completion of the railroad bridge over and across the Neosho river in accordance with the conditions of this agreement by the said parties of the second part; and the party of the first part hereby agrees to pay to said parties of the second part the further sum of one hundred thousand dollars in bonds (at par) of Bourbon county, Kansas, and seventy thousand dollars in bonds (at par) of Humboldt township, Kansas, when the said road-bed shall be completed and the necessary and proper bridges, culverts, water-courses, ditches, & cattle-guards shall be fully built according to the terms of this contract by the parties of the second part from the said point in the city of Fort Scott unto the bluffs in the eastern portion of Allen county, on the west side of the Marmaton river, and to pay to said parties of the second part, when the balance of said road-bed, to wit, from the line of said L., L. & Galveston railroad, in Humboldt township, Allen Co., K's, to the before-named point on the bluffs in the eastern portion of Allen Co., K's, is fully completed and united, according to contract, with all necessary bridges, culverts, water-courses, ditches, & cattle-guards, the further sum of twenty-five thousand dollars in bonds (at par) of Bourbon county, Kan., and at the expiration of six months thereafter the further sum of fifty thousand dollars in township bonds (at par) of township of Allen Co., K's, or Humboldt City bonds, or both, or, in

lieu thereof, bonds of like value and amounts, or the then market value of a like amount of such bonds in cash.

It is further stipulated & agreed by and between the parties hereto that before the work on said road-bed shall be commenced in the townships of Salem and Ellsmore, Allen county, K's, the said party of the first part shall give to said parties of the second part good and satisfactory security in the sum of fifty thousand dollars
90 for the prompt payment of said sum of fifty thousand dollars in bonds (at par) of townships of Allen Co., K's, before referred to, or, in lieu thereof, then market value in cash.

It is further agreed that if the said parties of the second part desire to receive and take one hundred thousand dollars in bonds (at par) of the township of Humboldt and city of Humboldt at the time that the thirty thousand dollars in bonds, as hereinbefore agreed to be delivered, shall become due and payable, then and in that case the parties of the first part agree that the said one hundred thousand dollars in such city & township bonds shall be delivered to the parties of the second part upon the giving by the said parties last named good and sufficient security to the satisfaction of the parties of the first part for the faithful performance of this said contract.

It is further agreed and stipulated that on said road-bed there shall be no unnecessary curves or grades, and as to the number and extent of its grades it shall be a good average road-bed, as compared with other Kansas railroad beds.

It is further stipulated and agreed by and between the parties hereto that all of said work shall be fully done and completed by the said party of the second part on or before the said 30th day of June, 1872, and if by reason of failure to complete said work or any part thereof any portion of the franchises of said party of the first part shall be lost or forfeited by the party of the first part, said loss or forfeiture shall be borne and inure to said party of the second part, and any such loss shall operate as a payment, to the extent of such loss, by the party of the first part to the party of the second part of the consideration hereinbefore mentioned and contained, it being hereby expressly agreed and understood by and be-
91 tween the parties hereto that time is of the essence of this contract and agreement.

In witness whereof the respective parties hereto have executed this contract in duplicate the day and year first above written, the party of the first part by the hands of its president and secretary, attested by its corporate seal, under and by virtue of a resolution of the board of directors of said corporation passed June 6th, 1871, and the parties of the second part by the hand of F. C. Smith & Co., by F. C. Smith.

JOHN S. REDFIELD,
Pres. Fort Scott & Allen Co. R. R. Co.

[SEAL.]

SAMUEL A. MANLOVE,
Secretary of the Fort Scott and Allen Co R. R. Co.

F. C. SMITH & CO.,
By F. C. SMITH.

[Endorsed:] Original contract between the Fort Scott — Allen Co. R. R. Company & F. C. Smith & Co.

92 In the Circuit Court of the United States, District of Kansas.

FRANKLIN C. SMITH, Compl't,

vs.

THE FORT SCOTT, HUMBOLDT & WESTERN R. R. Co. and THE BOARD of County Commissioners of Bourbon County, Kansas, Def'ts.

It is hereby stipulated and agreed by and between said complainant and The Board of County Commissioners of Bourbon County, Kansas, defendants, by their solicitors, that the testimony of L. B. Welch, county clerk of said county, may be taken this day at his office in Fort Scott, Kansas, as if upon due notice.

Fort Scott, Kansas, August 12th, A. D. 1882.

ROSSINGTON, JOHNSTON & SMITH,
Sol'rs for Complainant.

J. D. McCLEVERTY,
Sol. for said Def'ts, The Board of Co. Com'rs of Bourbon Co., Kans.

Depositions of sundry witnesses taken before me, W. J. Bawden, notary public within and for the county of Bourbon, in the State of Kansas, on the 12th day of August, A. D. 1882, between the hours of nine o'clock a. m. and six o'clock p. m., at the office of L. B. Welch, county clerk of the county of Bourbon aforesaid, pursuant to the annexed agreement, to be read in evidence on behalf of the complainant in said action.

The complainant appeared by Rossington, Esq., and the defendant appeared by J. D. McCleverty.

LEWIS B. WELCH, of lawful age, being by me first duly cautioned and solemnly sworn to testify the truth, the whole truth, & nothing but the truth, on his oath deposes and says:

My name is L. B. Welch; my age is forty-three years; my place of residence is Fort Scott; I am the county clerk of Bourbon county, Kansas.

93 Question. As such county clerk, state whether or not you are required by law to keep a minute of all the proceedings of the board of county commissioners, reduce the same to a permanent form to present it to the board of county commissioners for their signature and approval, and to attest it as county clerk, and whether or not you are the custodian, by virtue of your office, not only of such records as are made by yourself, but of all those made and preserved by your predecessors in the office of county clerk.

Answer. I am custodian of such records; the county commissioners sign all orders made by them, but the proceedings are attested only by the county clerk. At each regular or special meeting the entire proceedings of the preceding meeting are read and approved or corrected by the board of county commissioners.

Question. How long have you been county clerk?

Answer. Since January, A. D. 1880.

Question. Is there now in your office a complete original record of the proceedings of the board of county commissioners of Bourbon county since the first day of January, A. D. 1869?

Ans. It is in my possession, as recorded by my predecessors.

Question. Who was the county clerk in 1869, as shown by the records?

Ans. C. Fitch.

Question. Who constituted the board of county commissioners at that time?

Answer. D. Gardner, Lawrence Roberts, and D. R. Cobb.

Question. Who constituted the board in 1870?

Answer. D. Gardner, H. S. Ruble, and David R. Cobb.

Question. Who constituted the board in 1871?

Answer. D. Gardner, H. S. Ruble, and D. R. Cobb.

94 Question. Who constituted the board in 1872?

Answer. T. W. Chapman, J. W. Bainum, and B. R. Wood.

Question. When did Mr. Fitch go out of office as county clerk and who succeeded him?

Answer. Mr. Fitch went out of office in January, 1872, and was succeeded by J. H. Brown.

Question. Will you please turn to the records of your office, including the proceedings of the board of county commissioners, and commencing with the beginning of the year 1869 and ending at the end of the year 1873, and examine the same to find the record of all proceedings, orders, and resolutions touching first the submission of a proposition to a vote of the people of Bourbon county to vote one hundred and fifty thousand dollars of a subscription in the name and for the benefit of the county to the capital stock of any railroad company then or thereafter to be organized that shall construct a railroad commencing at the city of Fort Scott, running from thence west north of the Marmaton river upon the most practicable route in the general direction of Humboldt, Allen county, Kansas; second, touching or relating — the subscription of the capital stock of the Fort Scott and Allen County Railroad Company or the Fort Scott, Humboldt and Western Railroad Company, and the issuing of bonds in payment of said subscription.

Answer. I have these records now before me.

Question. Will you produce and attach to your deposition, for the use of the complainant, a certified copy of all these records?

Answer. I can and will.

The witness here produced the paper hereto attached and marked "Exhibit A," and says: I herewith produce a full and com-

95 plete transcript of the original proceedings, orders, and resolves of the board of county commissioners of Bourbon county, Kansas, relating to the matters upon which I have been questioned, as they appear in the record of the proceedings of said board.

On cross-examination by J. D. McCLEVERTY, attorney for the

Board of County Commissioners of Bourbon County, the witness says:

Question. This record, marked Exhibit "A," contains no notice of the proposed election mentioned in the order of July 23rd, 1869. Please state whether there is anything in the records, files, or archives of your office purporting to show whether or not any notice of any kind of said proposed election was ever published or made.

(Objected — by counsel for plaintiff as immaterial and incompetent.)

Answer. There is not.

L. B. WELCH.

I, W. J. Bawden, a notary public within and for the county of Bourbon, in the State of Kansas, do hereby certify that Lewis B. Welch was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by myself in the presence of said witness, and was subscribed by said witness in my presence, and was taken at the time and place in the annexed agreement specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 12th day of August, 1882.

My com. expires March 4th, 1884.

[SEAL.] W. J. BAWDEN,
Notary Public.

Notary's fees, $2.80.

96 EXHIBIT "A."

FORT SCOTT, *July 23d*, 1869.

Board met pursuant to adjournment.

Present: Full board; D. Gardner, cl'k of board; L. Roberts, David R. Cobb, commissioners.

The following proceedings were had under application from officers and directors of the Tebo and Neosho Railroad Company to the board to subscribe stock to the said railroad, to wit: Application being made to the board by the officers and directors of the Tebo and Neosho Railroad Company to subscribe stock to said railroad company to the amount of $150,000 in pursuance of the railroad election held May 7th, 1867, the board, upon mature consideration, decided that it was not advisable to make such subscription at the present time.

It is, however, further considered by the board that the following order be made in the premises:

Be it ordered by the County Commissioners of the County of Bourbon, State of Kansas, that there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter

that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route, in the general direction of Humboldt, Allen county, Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum:

Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors
97 of the county of Bourbon aforesaid and shall have received a majority of votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statutes in such cases made and provided, and that said question shall be submitted to said electors at a special election on Tuesday, the 24th day of August, A. D. 1869.

At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds;" and if it shall appear upon a canvass of the votes cast at said election by the proper officers, according to law, that a majority of the votes cast upon said question are in favor of said subscription then the above order shall be carried into practical operation by the issuing of the bonds to said company whenever the county commissioners of Bourbon county are satisfied that the bonds herein provided, for with the other resources of said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county; and whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad; and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th of May, 1867, aforesaid, will be generally satisfactory to the people of the county:

It is therefore ordered and provided that the decision of this question by the qualified voters of said county at the said election in favor of such subscription shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once, to the Tebo and Neosho Railroad Company, and the board of county commissioners will accordingly in such case make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and
98 conditions of said subscription are complied with by said railroad company.

D. GARDNER,
C'k of Board,
L. ROBERTS,
DAVID R. COBB,
Commissioners.

* * * * * * *

FT. SCOTT, *August 27th*, 1869.

Board met pursuant to previous order to canvass the vote of the election held on the 24th inst. in relation to the railroad bonds.

Present: A full board.

The following is the result of the election:

Township.	For bonds.	Against bonds.
Osage	6	76
Freedom	9	114
Timberhill	18	144
Franklin	3	171
Marion	63	61
Marmaton	46	40
Scott	229	7
Fort Scott, 1st ward	504	
Fort Scott, 2nd ward	532	
Drywood	13	30
Pawnee	5	60
	1,428	703

And it was declared that there was a majority for the railroad bonds of seven hundred and twenty-five (725), and that the question was carried, subject to the conditions of the call for said election.

The propriety of subscribing stock to the Tebo and Neosho
99 Railroad Company was duly considered and the following action taken:

Whereas an election was held in the county of Bourbon and State of Kansas on the 7th day of May, A. D. 1867, upon the following proposition, to wit:

"Be it ordered by the County Commissioners of Bourbon County, Kansas, that there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company, now organized or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo and Neosho railroad running westward via Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof and bearing interest at the rate of seven (7) per centum per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of all the votes cast in favor of the same in pursuance of an "Act to authorize counties and cities to issue bonds to railroad companies," approved February

10th, 1865, and that said question shall be submitted to said electors at a special election on the 7th day of May, A. D. 1867. At said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the road-bed of the Tebo and Neosho rail-
100 road is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the said road-bed and connect the said point with the city of Fort Scott.

(Signed) J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIMM,
Commissioners.

Attest: J. S. EMMERT, *Clerk.*

Which said proposition was declared carried on a canvass of said votes according to law, and so stands recorded on the public records of the county; and whereas some question arose afterwards as to the propriety and legality of subscribing the stock then voted to the Tebo and Neosho Railroad Company, an election was ordered and held in said county of Bourbon and State aforesaid, upon the following proposition, to wit:

Be it ordered by the county commissioners of the county of Bourbon and State of Kansas—

That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter that shall construct a railroad commencing at the city of Ft. Scott, in the county of Bourbon and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route in the general direction of Humboldt, Allen county, Kansas, and the bonds of said county to be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds shall not be issued until the question shall
101 have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid and shall have received a majority of the votes cast upon said proposition in favor thereof in pursuance of the provisions of the statute in such case made and provided, and that said question shall be submitted to said electors on Tuesday, the 24th day of August, A. D. 1869.

At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear, upon a canvass of the votes cast at said election by the proper officers according to law, that a majority of the votes cast upon said question are in favor of said subscription then the above order shall be carried

into practical operation by the issuing of the bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the bonds herein provided for, with the other resources of the said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county; and whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad;

And whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th day of May, 1867, aforesaid, will be generally satisfactory to the people of the county, it is therefore ordered and provided that the decision of the question by the qualified voters of said county at the said election in favor of such subscription shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once to the Tebo and Neosho Railroad Company, and the board of county commissioners will accordingly in such case make the subscription authorized
102 by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

(Signed) D. GARDNER,
Ch. of Board,
L. ROBERTS,
DAVID R. COBB,
Commissioners.

And whereas it appears from the canvass of the votes upon the proposition submitted on the 24th day of August, 1869, that fourteen hundred and twenty-eight (1,428) votes were cast in favor of said proposition and seven hundred and three (703) votes were cast against the same, whereby the said last-recited proposition was carried by a majority of all the votes cast, and the proposition voted upon at the election of the 7th day of May, 1867, was reaffirmed:

Now, therefore, in pursuance of said vote and the authority vested in us by law, we, the Board of County Commissioners of Bourbon County, do hereby constitute and appoint W. A. Shannon our agent to represent the county before the board of directors of the Tebo and Neosho Railroad company, and we hereby authorize and empower him, the said W. A. Shannon, to subscribe one hundred and fifty thousand dollars ($150,000) to the capital stock of the Tebo and and Neosho Railroad Company in the name and for the benefit of the county of Bourbon, said subscription to be made upon the express condition, which is hereby made a part of said subscription, that the bonds of said county of Bourbon in payment of said subscription shall not be delivered to said Tebo and Neosho Railroad Company, nor shall said county become liable for the payment of any portion of said subscription of stock until the road-bed of the Tebo and Neosho Railroad Company is completed to such a point that the amount of said bonds shall be sufficient and
103 adequate to construct and complete the road-bed of said Tebo

and Neosho railroad from Sedalia, in the State of Missouri, to said city of Fort Scott, in the State of Kansas.

And provided further, That this subscription shall be void unless said road-bed shall be so completed from Sedalia to Fort Scott by or before the 1st day of January, A. D. 1872.

And provided further, That no interest shall accrue or be paid on said bonds until the same shall have been delivered to said railroad company according to the terms and conditions before mentioned.

In testimony whereof the Board of County Commissioners have hereunto subscribed their names and caused their seal to be affixed at the city of Ft. Scott, Kansas, on this 27th day of August, A. D. 1869.

(Signed) D. GARDNER,
LAWRENCE ROBERTS,
DAVID R. COBB,
Commissioners.

Attest: C. FITCH, *County Clerk.*

* * * * * * *

FT. SCOTT, *Oct. 13th*, 1870.

Board met pursuant to adjournment.

Present: A full board. * * *

And now come the officers and directors of the Fort Scott and Allen County Railroad Company and make application for a subscription agent for the county to be appointed to subscribe for and in the name of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of said Fort Scott and Allen County Railroad Company. The board, after consideration, made the following order, to wit:

Whereas upon a proposition submitted to the electors of Bourbon county, Kansas, on Tuesday, the 24th day of August, 1869,
104 the Board of County Commissioners of said County were authorized to subscribe the amount of one hundred and fifty thousand dollars to the capital stock of any railroad running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of Marmaton river, in the general direction of Humboldt, Allen county, Kansas, and to issue the bonds of said county for the payment of said subscription, said bonds to be payable within thirty years from the date of issue, and bearing interest, payable semi-annually, at seven per cent. per annum:

Now, therefore, be it ordered by the Board of County Commissioners of Bourbon county, Kansas, that Joseph S. Emmert, of Bourbon county, Kansas, be, and hereby is, appointed subscription agent for Bourbon county, Kansas, and is hereby authorized and directed to subscribe for and in the name of Bourbon county, Kansas, one hundred and fifty thousand dollars to the capital stock of the Fort Scott and Allen County Railroad Company, yet upon this express condition that said company or their assigns shall complete the construction of their road-bed, ready for the iron, from Fort Scott

to the westerly line of Bourbon county, Kansas, by the first day of July, A. D. 1873.

Witness our hands this 13th day of October, A. D. 1870.

(Signed) D. GARDNER,
H. S. RUBLE,
DAVID R. COBB,
Commissioners.

FORT SCOTT, *July 28th*, 1871.

The board met pursuant to adjournment.

Present: D. Gardner, chairman; H. S. Ruble and D. R. Cobb.

* * * * * * *

Whereas the board having been this day waited on by parties representing the Fort Scott and Allen County Railroad Company with a request for action on the part of the board relative to
105 issuing bonds voted by the people on the 24th day of August, 1869, and it appearing to the board that considerable progress has been made in the works upon said railroad in this county, it is therefore ordered that the bonds aforesaid be prepared as soon as the same can be lithographed, and that they be lodged in the fire-proof safe in the vault attached to the treasurer's office, with the signature of the chairman only affixed to all the bonds and coupons to await further action by the board.

* * * * * * *

FORT SCOTT, KANSAS, *June 4th*, 1872.

Board met pursuant to adjournment.

Present: Thomas H. Chapman, chairman, and J. W. Bainum and B. R. Wood, commissioners.

* * * * * * *

The officers of the Fort Scott and Allen County Railroad Company on yesterday, the 3rd inst., appeared before the board and requested that the bonds voted to any railroad to be constructed westwardly in the general direction of Humboldt, in Allen county, Kansas, be signed and delivered to said company. The Board of County Commissioners of Bourbon County, Kansas, after mature deliberation and a careful examination of the evidence and reports as presented by said company, are not satisfied that the terms of the conditions of the subscription, as set forth and appear upon the records of the board of commissioners aforesaid, page 508, under date of October 18th, 1870, have been complied with, and therefore decline to issue and deliver said bonds to said railroad company.

Signed this 4th day of June, A. D. 1872.

THOS. W. CHAPMAN, *Chairman*,
J. W. BAINUM,
B. R. WOOD,
Commissioners.

106 * * * * * *

FORT SCOTT, KANSAS, *September 28th*, 1872.

Board met pursuant to call of the chairman, at the request of two members of the board, B. R. Wood and T. W. Chapman.

Present: T. W. Chapman, B. R. Wood, and J. W. Bainum, commissioners.

And now comes the Fort Scott, Humboldt and Western Railway Company and make application that the bonds of Bourbon county, in the sum of one hundred and fifty thousand dollars, be issued and delivered to said company as the successors of the Fort Scott and Allen County Railroad Company, in compliance with a proposition submitted to the electors of Bourbon county, Kansas, on Tuesday, the 24th day of August, 1869, authorizing the Board of County Commissioners to subscribe to the capital stock of any railroad, in the sum of one hundred and fifty thousand dollars, running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton river, in the general direction of Humboldt, and also in compliance with the subscription of said county to the capital stock of said railroad company under and by virtue of an order duly made October 13th, 1870; and the said board, having fully examined all the evidence produced before them in relation to the completion of said road-bed and the purchase by said railway company of the right of way for said road, and being fully advised in the premises, do find that there is no evidence before said board that the said right of way has been secured and the said road-bed completed in accordance with the terms of subscription as set forth upon the records of the said board of commissioners, on page 508, under date of October 13th, 1870; and the said board further find that said railroad company have not filed in the office of the county *the* clerk of said county of Bourbon a map and pro-

107 file of the route or intended route of the said railroad through said county of Bourbon, as provided by law.

Now, therefore, be it ordered by the Board of County Commissioners of Bourbon County, Kansas, that said application be, and the same is hereby, refused and denied. Be it also further ordered, by the board of county, commissioners of said county that the chairman of said board and the clerk of said board be, and are hereby, authorized, empowered, and directed to sign, issue, and deliver the bonds of said county of Bourbon to said Fort Scott, Humboldt and Western Railway Company in the sum of one hundred and fifty thousand dollars, in the following manner and upon the terms hereinafter set forth, whenever the said railway company shall complete, iron, and operate said railway to the distance of five miles in a westerly direction from Fort Scott, Kansas, then the chairman and clerk of said board of county commissioners shall deliver to said railway company the sum of seven thousand five hundred dollars per mile for said five miles so completed and operated, and so on for every five miles so completed and operated the said sum of seven thousand five hundred dollars per mile, until the full amount of the

said one hundred and fifty thousand dollars shall have been delivered.

THOS. W. CHAPMAN, *Chair.*,
B. R. WOOD,
J. W. BAINUM, *Commissioners.*

Attest: JAMES H. BROWN,
County Clerk.

* * * * * * *

FORT SCOTT, KANSAS, *Aug. 12th*, 1873.

Board met pursuant to adjournment.

Present: Thos. W. Chapman, chairman; J. W. Bainum and B. R. Wood.

* * * * * * *

Whereas the following proceedings were had by the board of County Commissioners of Bourbon County, Kansas, on the
108 28th day of September, A. D. 1872, upon application, as follows, to wit: And now comes the Fort Scott, Humboldt and Western Railway Company and make application that the bonds of Bourbon county in the sum of one hundred and fifty thousand dollars be issued and delivered to said company as the successors of the Fort Scott and Allen County Railroad Company, in compliance with a proposition submitted to the electors of Bourbon county, Kansas, on Tuesday, the 24th day of August, 1869, authorizing the board of county commissioners to subscribe to the capital stock of any railroad in the sum of one hundred and fifty thousand dollars running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton river, in the general direction of Humboldt; and also in compliance with the subscription of said county to the capital stock of said railroad company, under and by virtue of an order duly made October 13th, 1870; and the said board having fully examined all the evidence produced before them in relation to the completion of said road-bed and the purchase by said railway company of the right of way for said road, and being fully advised in the premises, do find that there is no evidence before said board that the said right of way has been secured and the said road-bed completed in accordance with the terms of subscription as set forth upon the records of the said board of commissioners, on page 508, under date of Oct. 13th, 1870; and the said board further find that said railroad company have not filed in the office of the county clerk of said county of Bourbon a map and profile of the route or intended route of the said railroad through the said county of Bourbon, as provided by law: Now, therefore, be it ordered by the Board of County Commissioners of Bourbon County, Kansas, that said application be, and the same is hereby, refused and denied. And whereas no further evidence has been filed or offered by the officers and members of said railway company that said road-bed
109 has been completed in compliance with the terms and conditions as set forth on the records of the county board of said

county, on page 508, under date of October 13th, 1870, it is hereby determined by the Board of County Commissioners of Bourbon County, Kansas, that justice to the tax-payers of said county requires that the bonds aforesaid shall not be issued to said railway company: Now, therefore, be it ordered by the Board of County Commissioners of Bourbon County, Kansas, that the subscription to the Fort Scott and Allen County Railroad Company, under date of October 13th, 1870, of one hundred and fifty thousand dollars be declared void and of no force and effect, and that the county clerk is hereby directed to deliver over to this board the lithograph bonds in his possession in the name of said Fort Scott and Allen County Railroad Company which have never been signed by the chairman and clerk, and that we, the board, proceed to destroy and burn the same this 12th day of August, A. D. 1873.

(Signed) THOMAS J. W. CHAPMAN,
J. W. BAINUM,
B. R. WOOD,
Commissioners.

Attest: JAMES H. BROWN,
County Clerk.

The foregoing is a true and perfect copy as testified to by me.
Witness my hand & seal of said county this 12th day of Aug., 1882.

[SEAL.] L. B. WELCH,
County Clerk.

Opened at the instance and request of complainant's solicitors, Rossington, Johnston & Smith, Sept. 16, 1882, as per stipulation.
A. S. THOMAS, *Clerk.*

No. 3001. Filed Aug. 16, 1882.

110 In the Circuit Court of the United States for the District of Kansas.

FRANKLIN C. SMITH
vs.
THE FORT SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY and The Board of County Commissioners of Bourbon County, Kansas.

The deposition of Joseph S. Emmert, of the city of Chicago, county of Cook and State of Illinois, a witness of lawful age, produced sworn, and examined upon his oath, on Friday, November 10th, 1882, at my office in Chicago, Illinois, room 30, 161 La Salle street, by me, Thomas B. Brougham, a notary public in and for the county of Cook and State of Illinois aforesaid, duly appointed by G. C. Lanphere, attorney for complainant, and J. D. McCleverty, attorney for defendant, Board of Commissioners of Bourbon County, Kansas, as such notary public, to take the testimony of said Joseph S. Emmert, a witness in a certain suit now pending in said circuit court

of the United States for the district of Kansas, wherein Franklin C. Smith is complainant and The Fort Scott, Humboldt and Western Railroad Company and the Board of County Commissioners of Bourbon County, Kansas, are defendants, the formalities of suing out a dedimus, notice, &c., being expressly waived by consent and agreement of the parties complainant and defendant.

The said JOSEPH S. EMMERT, being first duly sworn by me as a witness in the said cause, before the commencement of his examination, to testify the truth, as well on the part of the complainant as the defendant, in relation to the matters in controversy between the said parties so far as he should be interrogated, testified as follows:

Present: Thomas Bates, attorney for said complainant, and J. D. McCleverty, attorney for said defendant.

Direct examination by THOMAS BATES:

111 Q. State your name, place of residence, & age.

A. My name is Joseph B. Emmert and place of residence is 116 Walnut St., Chicago. My age is forty-two.

Q. Did you ever live in Kansas, Mr. Emmert?

A. I did.

Q. When—during what year?

A. From 1862 to 1876.

Q. In what county?

A. Bourbon county.

Q. Did you ever hold any official position in Bourbon Co.; and, if so, what?

A. Yes; county clerk.

Q. During what years were you county clerk?

A. My recollection is from 1863 to 1869; that is my recollection.

Q. State, Mr. Emmert, during that time what paper was the official organ of that county, or in what paper did you publish notices.

A. Fort Scott Monitor. It was in that paper the notices were published generally.

Q. Then your recollection is that during the year 1869 the Fort Scott Monitor was the official organ of Bourbon county?

A. That is my recollection.

Q. Do you recollect, Mr. Emmert, during the year 1869, of publishing in the Fort Scott Monitor notice of an election in which there was submitted to the people the question of subscribing 150,000 dollars of the bonds of Bourbon county to any railroad company then organized, or that might thereafter be organized, to construct a railroad from Fort Scott west and north of the Marmaton river, in the general direction of Humboldt, Kansas?

112 A. I cannot say that I recollect the year it was published or that I caused it to be published as county clerk.

Q. Do you recollect whether such a notice was published during that time?

A. I do, but don't know just the year. I don't know whether it was the year after or the year before.

Q. This notice, then, was published by you or under your direction as county clerk?

A. That I do not recollect whether it was under me or the one that followed me, as it was about the time I went out of office.

Q. If it was published during the time you were acting as county clerk it was done under your direction, was it not?

A. I think so.

Q. Mr. Emmert, do you remember whether or not you posted any notices of this election in addition to the publication?

A. I did not, personally; it was not the duty of the county clerk, I think.

Q. Will you look at this paper and state to me whether that is a copy of the notice that was published calling this election?

A. I think it is the substance of the notice—of a portion of the notice. I don't think it contains all the notice.

Q. You think that is a substantial copy, then, as far as it goes?

A. Yes, I do.

Q. Do you recollect of anything else being embodied in that notice which is not shown by that paper?

A. I think there was a clause in which it stated that a decision in favor of this vote should be a decision in favor of a former vote to the Tebo and Neosho railroad.

Q. Are you prepared to swear, Mr. Emmert, to swear there
113 was any such notice published in which that statement occurred?

A. I am prepared to swear to nothing positively, as the time is too long past.

Q. Do you remember, Mr. Emmert, of being appointed by the Board of County Commissioners of Bourbon County, Kansas, to subscribe 150,000 dollars of the bonds of Bourbon county in aid of the Fort Scott and Allen County Railroad Company?

A. I have a faint recollection of being appointed as such agent.

Q. Do you remember of voting these bonds at a meeting of the railroad company?

A. I have no recollection of ever being at any of their meetings or voting any bonds.

Q. It is a fact that you was appointed by the board of county commissioners as agent of the county to subscribe these bonds; is not it probably a fact that you did subscribe them?

Objection to question as incompetent and immaterial, for the reason that it is facts and not probabilities that witness is to testify to.

A. Well, my opinion would be that I did subscribe them; but it is simply an opinion, as I do not recollect of doing so.

Q. Your best opinion & recollection would be, Mr. Emmert, that you did subscribe the bonds, would it not?

Objected to as leading.

A. I have a very faint recollection that an objection was interposed, and that the bonds were not subscribed, but I do not know whether it was this road or another road. My opinion would be that they were subscribed, but I have no recollection.

A paper marked Exhibit "A" and hereto attached is the
114 paper handed Mr. Emmert, to which reference is made in this testimony.

Cross-examination by J. D. McCleverty on behalf of the Board of Commissioners of Bourbon County, Kansas:

Q. Is it not a fact, Mr. Emmert, that your recollection as to what you did as subscription agent for Bourbon county is quite indistinct?

A. It is; I did not recollect that I was ever appointed subscription agent until I studied over it for some time; it is so long since.

Q. Is not this the only instance in which you was at any time appointed as such a subscription agent for Bourbon county?

A. It is the only time I recollect of.

Q. Is it not a fact, then, that if an objection was interposed to your making a subscription that it was with reference to this particular subscription that the objection was made?

A. If an objection was made to a subscription to a raiiroad it would be my opinion that it would be to only this one, as this was the only one I was appointed subscription agent for, but about the same time I was appointed trustee to deliver the bonds to the Tebo and Neosho railroad, and the objection I referred to may have been in connection with that, as I have the two roads mixed in my mind.

Q. Is it not the fact that the board of county commissioners refused to make the subscription to the capital stock of the Fort Scott and Allen County Railroad Company, and only consented to and did authorize you to make the subscription when certain conditions had been complied with by the railroad company, and is not that, in fact, the objection to which you refer?

Objected to.

A. My recollection is that it was simply a conditional subscription that I was authorized to make, but whether the conditions
115 were that I should not make the subscription or whether I should make a conditional subscription I do not recollect.

Q. If you were only to make the subscription when certain conditions had been complied with, do you now think that you did make such a subscription?

Objected to.

A. Well, if that is the way I understood the order of the board, I would think so.

Q. Do you mean to say that you think you made the subscription regardless of the conditions and terms of the order of your appointment?

A. I do not.

Q. How long since you have seen the order appointing you subscription agent?

A. I saw what purported to be a copy of the order shown to me

by Judge Lanphere about three weeks ago. I do not know as I ever saw the original.

Q. Did not the board of commissioners require a subscription agent to make a report in writing when a subscription was in fact made, and if you made this subscription would you not have made such a report?

Objected to.

A. I know of no such instructions, and if I made the subscription at all I undoubtedly made it in the presence of the board at the time of my appointment and under their instructions, but I don't think I was ever spoken to about it afterwards; this is to the best of my recollection.

Q. You say that you think the authority to subscribe was only a conditional one. Can you now say whether you wrote out and signed a conditional subscription or not?

Objected to.

116 A. I cannot recollect of doing so.

Q. Have you any recollection that you did in fact make any subscription?

A. I have the faintest recollection of putting a subscription down for some person else for a larger amount than I could subscribe for myself, but whether it was for Bourbon county or to this railroad I cannot recollect.

Paper shown witness, which is hereto attached, marked "Exhibit B."

—. Please state whether you recognize this paper, "Exhibit B," as a copy of and embodying the terms of your appointment as such subscription agent.

A. I think this is the same as the copy that was shown me by Judge Lanphere as a part of the records of Bourbon county. I don't know that I ever saw the original, and cannot tell whether this is a copy of the original or not.

Q. Is it not the fact that the board of commissioners refused to authorize a subscription to be made at the time they made this order appointing you, and that what was meant and understood at the time by this condition was that no subscription should in fact be made until they were satisfied that the road-bed had been completed and constructed, ready for the iron, from Fort Scott to the western line of Bourbon county?

Objected to.

A. I don't recollect how the order was construed at the time, and I probably acted upon the instructions of those who understood it better than I did, if I made the subscription.

Q. If you made any subscription do you think you embodied the conditions upon which you were authorized to make it?

Objected to.

A. I think if I made a subscription it would be a plain sub-
117 scription, and let the order appointing me determine its conditions; that is the way I would think about it.

Q. Do you now recollect that you did in fact make a subscription or the terms of a subscription, if you in fact made one?

A. I do not recollect of making any subscription.

Q. What was your age at that time?

A. It was about twenty-nine years.

Q. How long had you lived at Fort Scott up to that time?

A. About eight years.

Q. Is it not the fact that neither the board of county commissioners and but few other persons in Bourbon county at that time had any faith that the Fort Scott and Allen County Railroad Company would ever construct their road?

Objected to.

A. I had but little business with the board of county commissioners and did not know their opinion. I had but little faith in it myself and took but little interest in it; some of the people of the county had faith in it and some had not.

Q. With reference to your recollection of the instance of this notice of election, is it not the fact that the proposed subscription to the Tebo & Neosho Railroad Company was also a subject of agitation and consideration in Bourbon county at the same time that this one was?

Objected to.

A. I think the principal interest was in the Tebo & Neosho railroad.

Q. Is it not a fact that the principal subject of discussion in Fort Scott and the eastern end of Bourbon county was with reference to the subscription to the Tebo & Neosho Railroad Company during the time of the pendency and canvass for the vote upon this subscription?

Objected to.

118 —. It was a fact, I think.

Q. Please state fully what the condition and place of that canvass & election was in Fort Scott and the eastern half of Bourbon county.

Objected to.

A. About the whole canvass—the whole electioneering in the eastern half of Bourbon county was in favor of the Tebo & Neosho railroad, and about the whole interest felt was in favor of that road.

Redirect examination by Mr. BATES:

Q. How was it in the western portion of the county, Mr. Emmert?

A. I presume the interest was in favor of the other part of the proposition, being the road running west.

Q. Was the publication made in the paper a copy of the order calling the election?

A. To the best of my recollection, a copy of the order of the board in full was given to the paper for publication.

JOSEPH S. EMMERT.

"EXHIBIT A," copied from the Weekly Monitor, the official paper.

"*Railroad Election.*

"Ordered by the board of the county commissioners that there be subscribed in the name and for the benefit of the county of Bourbon, State of Kansas, $150,000 to the capital stock of any railroad company, now organized or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west north of the Marmaton river upon the most practicable route in the general direction of Humboldt, Allen county, Kansas, and that the bonds of said county be issued to said company for the payment of said
119 subscription, said bonds to be payable within 30 years from the date thereof, and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid and shall have received a majority of the votes cast upon said proposition, in favor thereof, in pursuance of the statutes in such case provided, and that said question shall be submitted to said electors at a special election on Tuesday, 24th August, 1869. At the election the votes shall be cast for railroad bonds and against railroad bonds; and if it shall appear upon a canvass of the votes cast at said election by the proper officers, according to law, that a majority of the votes cast by — said question are in favor of said subscription, then the above order shall be carried into practical operation by the issuing of the bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the bonds herein provided for, with the other resources of the company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from Fort Scott to the west line of Bourbon county."

EXHIBIT "B."

Certified copy.

Whereas upon a proposition submitted to the electors of Bourbon county, Kansas, on Tuesday, the 24th day of August, 1869, the board of county commissioners of said county were authorized to subscribe the amount of one hundred and fifty thousand dollars to the capital stock of any railroad running westerly from Fort Scott, Kansas, through the county of Bourbon, on the north side of the Marmaton river, in the general direction of Humboldt, Allen county
120 Kansas, and to issue the bonds of said county for the payment of said subscription, said bonds to be payable within

thirty years from the date of issue, and bearing interest at the rate of seven per cent. per annum, payable semi-annually:

Now, therefore, be it ordered by the Board of County Commissioners of Bourbon County, Kansas, that Joseph S. Emmert, of Bourbon county, Kansas, be, and is hereby, appointed subscription agent for Bourbon county, Kansas, and is hereby authorized to and directed to subscribe for and in the name of Bourbon county, Kansas, one hundred and fifty thousand dollars to the capital stock of the Fort Scott and Allen County Railroad Company, yet upon this express condition, that said company or their assigns shall complete the construction of their road-bed ready for the iron from Fort Scott to the westerly line of Bourbon county, Kansas, by the first day of July, A. D. 1872.

Witness our hands this 13th day of Oct., 1870.

(Signed) D. GARDNER, *Chairman*,
H. S. RUBLE,
DAVID R. COBB,
Commissioners.

STATE OF KANSAS, *County of Bourbon:*

I, L. B. Welch, the county clerk in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true copy of the order made by the Board of County Commissioners of Bourbon County, Kansas, as shown by the *board* of their proceedings found recorded in Book "A, records of Bourbon county, Kansas, pages 508 and 509.

Witness my hand and the seal of said county this 7th day of November, 1882.

[SEAL.] L. B. WELCH,
County Clerk.

121 I, the above-named Thomas B. Brougham, a notary public, duly appointed by G. C. Lanphere, attorney for said complainant, Franklin C. Smith, and J. D. McCleverty, attorney for the Board of Commissioners of Bourbon County, Kansas, defendant, to take the deposition of the said Joseph S. Emmert, the witness whose name is subscribed to the foregoing deposition, do certify that before the commencement of his examination as a witness in the said suit between the said Franklin C. Smith, complainant, and the Fort Scott, Humboldt, and Western Railroad Company and the Board of Commissioners of Bourbon County, Kansas, defendants, he, the said Joseph S. Emmert, was duly sworn by me to testify the truth in relation to the matters in controversy between the said parties so far as he, the said Joseph S. Emmert, should be interrogated concerning the same; that the said deposition was taken at my office, room 30, number 161 La Salle street, between the hours of ten o'clock a. m. and 12 m. on Friday, November the tenth, 1882, and that after the said deposition was taken by me as aforesaid the interrogatories and cross-interrogatories and the answers thereto, as written down, were read over to the said Joseph S. Emmert, and that thereupon

the said deposition was signed and sworn to by the said Joseph S. Emmert before me at the place and on the day last aforesaid.

[SEAL.] THOMAS B. BROUGHAM,
Notary Public, Cook County, Illinois.

Endorsed: No. 3001. In the United States circuit court for the district of Kansas. Franklin C. Smith, complainant, *vs.* The Fort Scott, Humboldt and Western Railroad Company and the Board of Commissioners of Bourbon County, Kansas. Deposition of Joseph S. Emmert.

122 FRANKLIN C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD CO. *et al.*, Defendants. } 3001.

SATURDAY, *September 16th*, 1882.

We hereby agree that the depositions herein may be published by the clerk on request of either party, and that the depositions of the Co. clerk of Bourbon county may be taken off the files by complainant's solicitors.

ROSSINGTON, JOHNSTON & SMITH,
Complainant's Sol'rs.

J. D. MCCLEVERTY,
Sol'r for Defts, The Board of County Com'rs of Bourbon Co., K's.

Stipulations.

O. B. D., page —.

In the Circuit Court of the United States, District of Kansas.

FRANKLIN C. SMITH, Compl't,

vs.

THE FORT SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY and The Board of Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, Def'ts,

It is hereby stipulated and agreed by and between said complainant and the said defendant, The Board of County Commissioners of Bourbon County, Kansas, that this cause shall be continued to the next term of this court, with leave to both of said parties to continue the taking of testimony, and all the testimony to be taken and filed herein on or before the 25th of May, A. D. 1883.

123 Dated this 22nd day of November, 1882, at Fort Scott, Kansas.

G. C. LANPHERE,
Sol'r for Compl't.

J. D. MCCLEVERTY,
Sol. for Def't, Bourbon Co., Kansas, and Board of Co. Com'rs of said Co.

Endorsed: No. 3001. Franklin C. Smith *vs.* The Fort Scott, Humboldt & Western R. R. Co. *et al.* Stipulation to continue case and extending time to take testimony. Filed Nov. 23, 1882. A. S. Thomas. clerk, by Frank J. Thomas, deputy.

J. I.

FRANKLIN SMITH
vs.
FORT SCOTT, HUMBOLDT & WESTERN R. R. COMPANY. } 3001.

WEDNESDAY, *November* 29, 1882.

Continued as per stipulation.

O. B. E., page 20.

FRANKLIN C. SMITH
vs.
FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD COMPANY, The County of Bourbon, Kansas, and The Board of County Commissioners of said Bourbon County, Kansas. } 3001.

APRIL 20, 1883.

It is stipulated and agreed by and between the parties to the above-mentioned suit that the opinion of the said supreme court in the above-entitled suit was filed by said court on the 21st day
124 of April, 1879.

J. D. McCLEVERTY,
Att'y for Bourbon Co., K's.
G. C. LAMPHERE,
Sol'r for F. C. Smith.

Stipulation.

FRANKLIN C. SMITH, Compl't,
vs.
THE FORT SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY and The Board of Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas, Def'ts. } 3001.

It is hereby stipulated and agreed by and between said complainant and said defendant, The Board of County Commissioners of Bourbon County, Kansas, that this cause shall be continued to the next term of this court, with leave to both of said parties to continue the taking of testimony, and all the testimony to be taken and filed herein on or before the 25th day of May, A. D. 1883.

Dated this 22nd day of November, 1882, at Fort Scott, Kansas..

G. C. LAMPHERE,
Sol'r for F. C. Smith.
J. D. McCLEVERTY,
Sol'r for Def't, Bourbon Co., Kans., and Board of Co. Com'rs of said Co.

125 In the Circuit Court of the United States, District of Kansas.

FRANKLIN C. SMITH, Compl't,

vs.

THE FORT SCOTT, HUMBOLDT & WESTERN R. R. Co. and THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, Def'ts.

It is hereby stipulated and agreed by and between said complainant and The Board of County Commissioners of Bourbon County, Kansas, defendants, by their solicitors, that the testimony of T. W. Chapman, D. R. Cobb, C. G. Waite, C. Fitch, L. B. Welch, J. H. Brown, E. M. Hulett, B. P. McDonald, and others on behalf of said defendant, Board of Commissioners, may be taken on this and succeeding days at the office of J. D. McCleverty, in Fort Scott, Kansas, as if upon due notice.

Fort Scott, Kansas, April 26th, A. D. 1883.

ROSSINGTON, JOHNSTON & SMITH,
Sol'rs for Complainant.

J. D. McCLEVERTY,
Sol. for said Def'ts, the Board of Co. Com's of Bourbon Co, Kansas.

Depositions of sundry witnesses taken before me, W. J. Bawden, a notary public within and for the county of Bourbon, in the State of Kansas, on the 26th day of April, A. D. 1883, between the hours of eight o'clock a. m. and six o'clock p. m., at the office of J. D. McCleverty, in the city of Fort Scott, in the State of Kansas, in said county of Bourbon, pursuant to the annexed agreement, to be read in evidence in behalf of the defendant, Board of County Commissioners of Bourbon county, Kansas, in said action.

The complainant appeared by W. H. Rossington, Esq., his solicitor; the defendant, The Board of County Commissioners of Bourbon County, Kansas, appeared by its solicitor, J. D. McCleverty, Esq.

126 T. W. CHAPMAN, of lawful age, being by me first cautioned and solemnly sworn, on his oath deposes and says:

1. My name is T. W. Chapman; my age is sixty years; my residence is in Scott township, Bourbon county, Kansas; I have been a resident of said township continuously for twenty-three years; my occupation is that of a farmer.

2. Question. State if you was a member of the Board of County Commissioners of Bourbon county, Kansas; and, if so, during what period you was such member.

Answer. I was a member of the Board of County Commissioners of Bourbon County, Kansas, for the years 1872 and 1873.

Question. Calling your attention to that portion of the record of proceedings of the board of county commissioners attached to the depositions of L. B. Welch in this case, of the date June 4th, 1872, you will please state in what respect the Fort Scott and Allen County Railroad Company had failed in complying with the conditions re-

ferred to in that portion of the record just referred to, and state the same as fully as you can now recollect.

(Objected to by complainant's solicitor as incompetent and immaterial.)

Answer. If my recollection serves me right, one objection was that there was no profile of the road filed in the office of the county clerk as required by law, and that the railroad company had not taken the proper and legal steps for acquiring the right of way through this county. I will state that a very prominent objection was the insufficiency of the engineer in charge in his statement of the condition of the road and what had been done. We did not personally examine that road; there was one or two of the commissioners that did, but I did not, but we had the report of one
127 of the commissioners who did examine it, B. R. Wood, and we considered it too steep grades, the trussel-work very trifling and inefficient. This is my best recollection, after so much time has elapsed, of the circumstances and the reasons for refusing to issue the bonds.

Question. You state that no profile was filed in the office of the county clerk; please state if that railroad company had, up to that time, filed either a map or profile of its route through Bourbon county, Kansas, in the office of the county clerk of said county.

(Objected to by complainant's solicitor on account of its being incompetent, immaterial, and irrelevant.)

Answer. To my recollection there had not been either filed.

Question 5. Please state whether more than one question was discussed by the people and understood by them to be pending and to be determined by the result of the election held under the call of July 23rd, 1869, with reference — subscribing one hundred and fifty thousand dollars of stock for and on behalf of Bourbon county, Kansas, to the capital stock of any railroad company, as stated in the words of said call, "that shall construct a railroad, commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route in the general direction of Humboldt, Allen county, Kansas;" and, if so state what those questions were.

(Objected to by complainant's solicitor because incompetent, immaterial, and irrelevant.)

Answer. There were two propositions submitted to be determined by the same vote, and was so understood by the people—at least I so understood it, and those with whom I talked and persons whom I heard talking around the polling-places on election day so
128 understood it and talked it—one proposition was for the bonds of the Humboldt road, the road referred to in this question; the other was that if these bonds carried it would be a confirmation of the former vote on the Tebo and Neosho road, the vote on the Tebo and Neosho road being in doubt; the propositions were for one hundred and fifty thousand to each road.

Question. 6. State in what direction it was understood those two roads would run through Bourbon county, Kansas, and whether both were to run through Scott township.

(Objected to by complainant's solicitor because incompetent, irrelevant, and immaterial.)

Answer. The Humboldt road, commencing at Fort Scott and runing west, on the north side of the Marmaton river. The Tebo and Neosho, afterwards called the Missouri, Kansas and Texas, now the Missouri Pacific, was to be as the Missouri Pacific is now located, I think, coming in on the east line of the county, crossing the Marmaton river at Fort Scott, and running in a southwesterly direction through the county. The Humboldt road would go nearly through the center of the county.

Question 7. State whether the board of county commissioners, during the time you were a member thereof, took any part in the affairs or proceedings of the Fort Scott and Allen County Railroad Company or of the Fort Scott, Humboldt and Western, as it was afterward called?

Answer. None, to my knowledge. I can say that we did take none.

Cross-examination by complainant's solicitor:

Question 8. You first assumed the duties of your office in January, 1872, did you?

Answer. I think I did; that is my recollection.

Question 9. Who were your associates in the board?

129 Answer. J. W. Bainum and B. R. Wood.

Question 10. Referring to your testimony of the meeting on June 4th, 1872, touching the reasons which influenced you in deciding not to issue the bonds, was any record made of those reasons as you have detailed them?

Answer. I do not remember; none, except such as are set out in the records of the proceedings of the board of that date.

Question 11. Was the railroad company ever formally notified by you or any member of the board in what respect they had been delinquent?

Answer. I do not remember whether they were or were not; I could not say.

Question 12. Is it not a fact that at that time—I mean at the time of that meeting—the bonds had been issued to the Tebo and Neosho Railroad Company and the county of Bourbon had determined, through its board of commissioners, acting under legal advice, that those bonds were invalid and had defaulted in the payment of interest on the same?

Answer. To the best of my recollection the bonds to the Tebo and Neosho railroad had been issued at that time, and, as I recollect, the same summer; but after this meeting the county determined to fight the Tebo and Neosho bonds on account of their invalidity.

Question 13. Had the board discussed the invalidity of the Tebo

and Neosho bonds before determining to fight them, and how long prior thereto?

Answer. We were discussing the validity of the Tebo and Neosho bonds for some months before we took action thereon.

Question 14. Was not the subject probably under discussion at the meeting on the 4th day of June, 1872?

130 Answer. I remember of no discussion of the Tebo and Neosho at that time.

Question 15. Was it not probable it was discussed at that time?

Answer. I have no recollection of it.

Question 16. Do you remember upon what grounds you were advised and became determined that the Tebo and Neosho bonds were illegal?

Answer. One ground, it is my recollection, was that when there was a direct vote on them that if the whole vote of the county had been counted they were voted down, and that that was the only direct vote that was voted. I do not remember whether there was any other ground.

Question 17. Was it not urged as a reason why these bonds were illegal that no corporation was named in the proposition submitted to the people?

Answer. If my recollection serves me right, there was some question raised of that kind.

Question 18. Was that not equally true as a reason against the validity of any bonds which might be issued under the proposition to aid the Fort Scott and Allen County railroad?

Answer. I never heard the question raised in regard to that road.

Question 19. Was there any question raised as to the legality of the proposition to vote aid to the Fort Scott and Allen County railroad, or the validity of the subscriptions made thereunder?

Answer. There was not, to my knowledge, any question raised as to the legality of the proposition, but I never heard of any subscription being made; there was no subscription, to my knowledge.

Question 20. Was the question as to whether the county had or had not subscribed considered by the board at the meeting of June 4th, 1872?

Answer. I have no recollection of the question ever being raised or discussed.

131 Question 21. Was it the understanding of the board then, at that meeting, that a subscription had in fact been made?

Ans. Not to my recollection; I do not remember any such.

Question 22. Was it the understanding of the board that a subscription had not been made?

Answer. I do not remember that the question was ever raised.

Question 23. How, then, did you come to take formal action at that meeting upon the application of the railroad company for an issue of bonds and to refuse that application upon the grounds set forth in that resolution of June 4th, 1872?

Answer. On the reason I have heretofore stated: Because we were not as much lawyers as you. I do not know how to answer it any other way than I have stated.

Question 24. I will ask you if you remember if there was any discussion at any time during the period that you were an acting member of the board of county commissioners as to the validity of the subscription to the Tebo and Neosho railroad?

Answer. I never heard the question discussed or raised, to my remembrance.

Question 25. Did you not understand that a subscription had been made to the Tebo and Neosho railroad and that the county had been accredited with stock upon that subscription?

Answer. Not to my knowledge; it was all before my time, and the question did not come up.

Question 26. Do you know where the line of the Fort Scott and Allen County railroad is?

Answer. I crossed it at different points at different times.

Question 27. Is it not a fact that there is now a railroad
132 constructed and in operation along the grade of the Fort Scott and Allen County railroad in this county?

Answer. To the best of my knowledge, there is a road on a portion of that road—not the whole of it.

Question 28. Will you say, if you know, what proportion of that road-bed within the limits of Bourbon county is now so used and occupied?

Answer. I do not know.

Re-examined by defendants' solicitor:

Question 29. Is it not a fact that if *fact* any subscription was made either to the capital stock of the Tebo and Neosho Railroad Company or of the Fort Scott and Allen County Railroad Company, that such subscription was made prior to the time you became a member of the board of county commissioners, and that the question of such subscription was never enquired into by you?

Answer. If any such subscription was made it was made prior to our time, and the subscription to either road was never enquired into by us.

Question 30. At the time of the application mentioned in the proceedings of June 4th, 1872, made by the officers of the Fort Scott and Allen County Railroad Company, what information, if any, did your board obtain from them as to the amount of right of way of their road then owned by that railroad company in this county?

(Objected to by complainant's solicitor as incompetent, immaterial, and irrelevant, and as endeavoring to show by oral testimony and hearsay what can only be proved by original deeds or the public records thereof.)

Answer. To the best of my recollection, there was no evidence produced that there was any right of way obtained.

Recross-examination:

133 Question 31. Is it not true, Mr. Chapman, that your memory upon all these affairs is made naturally vague and indis-

tinct by the lapse of the ten years that have intervened since their occurrence?

Answer. I would say that in a measure that might be the case; my memory is about as good as most men's, but I cannot recollect it as well as if it was a shorter time.

THOS. W. CHAPMAN.

C. G. WAITE, of lawful age, being by me first examined, cautioned, and solemnly sworn, on his oath deposes and says:

Ques. 1. ——.

—. My name is C. G. Waite; my age is fifty-four years; I reside in Neosho county, Kansas; am by occupation a civil engineer; have been in that occupation nearly continuous ever since 1850.

Question 2. State if you have been engaged in the construction of railroads in this part of the State of Kansas; and, if so, how long.

Answer. I have been ever since 1870.

Question 3. Are you acquainted with the grade of the Fort Scott and Allen county Railroad Company that was constructed by the complainant in this case through this county in 1871 and 1872?

Answer. I am; have been acquainted with it, more or less, ever since 1872.

Question 4. Did you know the cost of the kind and character of work necessary to be done in the construction of a railroad grade along the line when that grade was located at the time it was being constructed?

(Objected to by complainant's solicitor as immaterial.)

Answer. I did.

Question 5. At the time of the making of the contract for the making of that grade, which was in June, 1871, and during the time work was being done upon that grade, what was it worth to construct a fair average railroad grade on the route where
134 that grade was located through this county, including all culverts and bridges, so that the same should be completed ready to lay the ties and irons.

(Objected to by complainant's solicitor as immaterial.)

Answer. About five thousand dollars per mile.

Question 6. What was the length of that grade from Fort Scott to the west line of this county?

Answer. Twenty-three miles.

Question 7. Did you know what the value of cross-ties for railroad was at that time; and, if so, what were they worth?

(Objected to by complainant's solicitor as immaterial.)

Answer. Sixty cents a piece.

Question 8. How many ties per mile were usually laid at that time—per mile—on a fair average railroad in this section of country?

(Obj. to as before.)

Answer. Twenty-six hundred and forty per mile.

Question 9. If you have made a calculation of what the necessary ties would be worth for that twenty-three miles you may state what it would be, putting the values at the time above mentioned.

(Objected to by complainant's solicitor as incompetent, immaterial, & irrelevant.)

Answer. I have. Omitting switch ties, side tracks, it would be thirty-six thousand four hundred & thirty-two dollars.

Question 10. Have you recently made a careful examination and measurement of the work necessary to be done on the line of that grade at the time the old grade was being constructed and are the prices you have given based upon that examination and measurement?

(Obj. to by complainant's solicitor for same causes as last question.)

Answer. I did; and the prices I have given are based on
135 that examination and measurement.

Question 11. Since 1870 upon what other lines of railroad have you been employed and in what capacity?

Answer. In 1870 and 1871 I was principal assistant engineer in charge of the Tebo and Neosho railroad, since known as the Missouri, Kansas and Texas railroad, from Sedalia, Missouri, to Parsons, Kansas. Since 1871 I have been chief engineer of three lines of railroad and am chief engineer of one now.

Question 12. Did you have charge of construction of the Missouri, Kansas and Texas railroad through this county? And, if so, state when that road was constructed from Fort Scott to the south line of the State of Kansas.

Answer. I was in charge from Sedalia to Parsons; it was completed for operation to Parsons in January, 1871. The Neosho division, from Parsons to the State line, I had nothing to do with; my impression is it was built in 1869. The work of grading and constructing was done through Bourbon in 1870, and was completed to Parsons in Jan'y, 1871.

Question 13. Did you in your capacity as engineer in charge of the work of constructing the Missouri, Kansas and Texas railroad through this county and on down to Parsons obtain a franchise knowledge of the value and character of such work in this county at that time?

Answer. I did.

Question 14. Please describe the work that was done on the line of the Fort Scott and Allen County railroad, afterwards known as the Fort Scott, Humboldt and Western, through this county from Fort Scott to the western line of the county under the complainant's contract.

(Objected to by complainant's solicitor as incompetent,
136 immaterial, and irrelevant.)

Answer. I think the road was very badly located, the

grades narrow and steep, culverts good, bridges not worth a dollar for the purpose intended.

Question 15. What was the character of the country with reference to a railroad grade, from a point where the present St. Louis, Fort Scott & Wichita railroad line leaves the old grade of the Fort Scott and Allen County railroad where it turns off toward Iola to the west line of this county?

(Objected to by complainant's solicitor as immaterial.)

Answer. Immediately after leaving that point there is a place for a bridge nine hundred and sixty feet long—that is to say, there is a place left in the old grade for a bridge of that length; from there to within half a mile of the Allen county line it is nearly all rock. The ground rises the first two miles about seventy feet to the mile; it is cut up with some deep ravines, perhaps forty feet deep; it would be very expensive to construct a road there of usual grades. Our usual maximum grades in this country is one per cent., or fifty-two and eight-tenths feet to the mile. Of all the roads that I have had charge of one per cent. has been the maximun. All engineers of my acquaintance have a great adherence to that maximum, and if it is possible to keep within that grade they do it, though at additional expense.

Question 16. How steep was the grade from the west end of the bridge you have described, through this rocky country you have mentioned, and what was the character of the rock?

Answer. A grade of from forty to eighty feet per mile; two-thirds—perhaps more—was solid rock, the balance loose rock and earth.

Question 17. Were there any other points between Fort
137 Scott and that bridge on the old grade that were steep; and, if so, to what extent and what was the character of the work?

(Objected to by complainant's solicitor as immaterial.

Answer. The first cut out of Fort Scott was very steep; perhaps seventy-five feet to the mile solid rock; it was perhaps half a mile steep grade and a quarter of a mile rock. There were some other points that exceeded the maximum grade a little, but not very bad.

Question 18. What was the width of the cuts and embankments on that old grade as compared with the work usually done in this section of country?

(Objected to same as last question.)

Answer. The excavations were from fourteen to sixteen feet wide; on other roads they are usually eighteen; embankments from eight to twelve feet; on other roads they are usually twelve feet; for four feet high and under, and over four feet, fourteen feet wide.

Question 19. State, if you know, what would be understood among railroad men to be included in the requirement of language substantially as follows: "That these bonds shall not be issued until the board of county commissioners are satisfied that the railroad company have means sufficient and adequate to construct a railroad

bed, ready for the iron, from Fort Scott to the western line of Bourbon county."

(Objected to as before, as incompetent, immaterial, and irrelevant.)

Answer. I should think that it would include a railroad ready in every particular to lay the iron. I am not certain in regard to side tracks; it would include grades, culverts, bridges, and cross-ties.

There not being time to complete the taking of these depositions, the further taking of the same is adjourned until to-morrow morning, April 27th, 1883, at half past eight o'clock a. m. at the same place.

W. J. BAWDEN,
Notary Public.

138 FRIDAY, *April 27th*, 1883.

The taking of these depositions is continued in pursuance to adjournment.

Present: Same as yesterday.

Cross-examination of the witness, C. G. WAITE, by the complainant's solicitor:

Question 20. Have you ever, as a railroad civil engineer, had charge of the maintenance of way of a completed railroad?

Answer. Not fully, but nearly so.

Question 21. Your knowledge and observation within the line of your profession has made you familiar with that kind of work, has it not, Mr. Waite?

Answer. Yes, sir.

Question 22. I understood you to say that twenty-six hundred and forty cross-ties were necessary per mile. Is there ever a greater number of ties than that used?

Answer. Sometimes greater, sometimes less, depending upon their size. The average is always considered twenty-six hundred and forty, except on bridges; we put them nine inches apart.

Question 23. What is the present average of ties on the Missouri, Kansas and Texas railroad?

Answer. Twenty-six hundred and forty.

Question 24. How long has that road been built and completed?

Answer. Nearly thirteen years.

Question 25. Is it customary to put as many cross-ties in the construction of new roads as afterwards when the road is trimmed and surfaced, as it is called?

Answer. The whole complement is more needed when the embankments are new and soft than thereafter; usually no difference; usually adhere to the twenty-six hundred and forty as near as possible. I have known exceptions. I have known them put
139 further apart. I have known them put closer together sometimes, to save ties in some instances, on the Missouri, Kansas and Texas, when the road was wet. They were laid with one foot

only between the bearings. Such cases were exceptions, it being expensive to respace.

Question 26. Do you know anything of the history of the grades and curves of the two great railroads of this State, the Atchison, Topeka & Santa Fé and the Kansas Pacific?

Answer. I do, in a general way.

Question 26. Do you not know as a fact that the Kansas Pacific and the Atchison, Topeka and Santa Fé had, at their completion, grades that would run as high as seventy-five and eighty and eighty-five feet to the mile, notably in Osage and Marion counties, Kansas, for the Santa Fé, and at Raton Pass, in New Mexico, and through what are known as the Harker Hills, in Western Kansas, and the Cheyenne Bluffs or Hills, in Colorado, on the Kansas Pacific railroad? And do you not know it further to be a fact that they have for many years since their completion been gradually at work reducing these grades, straightening their lines, and otherwise improving the character of the alignment of these railroads, but in the meanwhile and at the present time keeping extra engines at these precipitous points for train service and running what is known as double headers to carry their trains over the grades?

(Objected to by defendant's solicitor as incompetent and no proper cross-examination, because not confined to this section of country.)

Answer. Yes, sir, I do.

Question 27. Do you know the character of the surface of Osage and Marion counties, Kansas?

Answer. I do not.

140 Question 28. Have you traveled extensively over the State of Kansas?

Answer. Quite extensively.

Question 29. What is the general characteristic of the surface of Kansas, taken as a State?

Answer. Generally a tolerably smooth, rolling country; some exceptions.

Question 30. Do you know Shawnee county?

Answer. Yes, sir.

Question 31. Is Bourbon county more or less rolling, would you say, than Shawnee county?

Answer. More, if any difference.

Question 32. I understood you to say, Mr. Waite, that it was customary to increase the width of the surface of the grade in proportion to its height. What did you give as the reasons for that?

Answer. To give greater stability and provide for wearing away, which always occurs, and can never be put up as cheaply as when first constructed.

Question 33. How recently have you gone over this grade?

Answer. On last Wednesday.

Question 34. Did you go at the instance of the defendant county to take actual measurements so as to be able to testify as to the condition of this grade, and did you take such measurements with care and accuracy?

Answer. I did go for that purpose and I did take such measurements upon the last occasion of measurement, but have measured it all once before, and a portion of it twice before, which was not at the instance of the county.

Question 35. Over how much of that grade is there a railroad constructed at the present time?

Answer. About eighteen miles.

141 Question 36. What improvements to the excavations or fills was made for the purpose of enabling the work to be done, if you know?

Answer. I have not the detailed figures at hand, but generally widening the banks and excavations, lowering the excavations, raising the embankments, and some little ditching.

Question 37. You say you have measured this work before; when was the first time you measured it?

Answer. In 1872.

Question 38. How did you come to measure it at that time?

Answer. I measured it at the instance of Franklin C. Smith.

Question 39. Did you preserve the figures of that measurement?

Answer. Not in detail.

Question 40. Did the measurement of the eighteen miles over which a railroad is built as made by you recently differ materially from the measurement made in 1872?

Answer. Not very materially.

Question 41. Is it not customary in the construction of railroads to build wooden bridges as temporary structures and subsequently to replace them with structures of a more permanent character—of stone and iron?

Answer. It is; and more common in this country to rebuild with wood.

Question 42. How long has this grade been built?

Answer. Eleven years, nearly.

Question 43. Does such a grade suffer serious deterioration by not being used and by being abandoned to the wear and tear of the elements?

Answer. It does.

142 Question 44. Is there not a division among engineers as to whether cross-ties are a part of the superstructure of a railroad and as to whether the road-bed proper is the grade made ready for the ties and iron?

Answer. It has frequently been discussed, but a pretty general adherence to making the division between iron and ties growing out of the custom to build the road out of two characters of funds, grading and ties usually furnished by small operators, who have to have money or its equivalent. Iron is frequently furnished by large operators for bonds, that would not bring the cash for grading and ties until after the iron is laid.

Question 45. Is or is it not usual to buy ties with reference to the weight and quality of the iron—as to their size and length?

Answer. I think not.

Question 46. How long have cross-ties been in use as at present used in this county?

Answer. Ever since "T" rails were used.

Question 47. Prior to that time to what was the said — fixed?

Answer. Longitudinal timbers laid upon sleepers.

Question 48. Is it customary to cross-tie an entire railroad before laying the iron, or to lay the cross-ties coincidently with the laying of the iron, and affixing the same by bolts or spikes to the cross-ties?

Answer. It may be done either way; it is more customary to lay the cross-ties coincidently with the iron; it depends upon how the ties are delivered upon the road. If from the end of the road by wagons it will not pay to haul them a great distance, but if delivered otherwise they may be laid at any time after the grade is ready.

Question 49. In the construction of a railroad are there not two classes of laborers, namely, those who do the exavation and filling, or dump work, and what are known as track-layers or track-men?

143 Answer. The same character of labor makes the grade and handles the ties. A different character of labor lays the iron.

Question 50. Is it not customary for the same gang of laborers who spike the rails in the construction of a new railroad to handle and place the cross-ties upon which the rails are to be spiked?

Answer. Spikers are regarded as professionals and get extra pay. They are frequently sent forward to lay ties, at a reduced rate of wages, and their time kept separate, for which they are dissatisfied and frequently quit work for want of steady work spiking.

Question 51. Are the ties, if distributed along the grade, considered to be finally fixed in place until they are adjusted with reference to the rails to be laid upon them by those or under the direction of those whose business it is to lay the rails, and is the earth about them not frequently rearranged and lowered and raised while the spiking is going on?

Answer. It is customary to readjust the ties several times before the road is complete, but not customary to respace the ties or adjust the same during the time of laying the iron, except in some instances where the joints are required to come on or between the ties, some engineers preferring the former and some the latter.

Question 52. Are the rails fastened to the cross-ties; and, if so, how?

Answer. Usually by five and a half inch by nine-sixteenths inch iron spikes driven into the ties, the head overlapping the webb of the rail.

Question 53. Are the rails fastened together in a continuous line; and, if so, how?

Answer. They are usually connected with iron straps, placed on both sides of the rail and bolted through the rail with four bolts, two in each rail.

Question 54. If a lever were placed under the rail with a

144 sufficient fulcrum and the proper power applied to the small

arm to raise the rail, and the bolts and spikes would hold, would it not lift rails, cross-ties, and all as a united and integral piece of mechanism?

Answer. It would.

Question 55. Has your professional attention as an engineer ever before been called to a form of words similar to that contained in question number 19, asked by defendants' solicitor; and, if so, how often and in what cases? State fully.

Answer. It has been called to it. I cannot say how often. The last that I remember was in 1883, on the Girrard and Topeka road, where a question arose in regard to ties being included in bridges, contractors for bridges refusing to put ties upon the bridges. After discussion and investigation they put them on.

Question 56. Is not the word "bridge," in both the common and scientific application, inclusive in its nature, and does it not include both the substructure and superstructure, and are not the ties of a railroad bridge an essential and indispensable part of the bridge itself?

Answer. I so decided in the last case referred to, and think so still.

Question 57. Is this the only case that you can now recall in which a question similar to that contained in question 19 has been submitted to you?

Answer. It has been frequently submitted, but I cannot recall the places and time.

Question 58. In the construction of a railroad bridge are the elements not as follows, first, abutments and piers of stone, wood, or piling upon which are longitudinally extended stringers, supported by truss or other work, with cross-ties of sawed timber from twelve to fourteen feet in length at right angles with the stringers, and in close proximity, so as to constitute substantially the bridge-bed?

Answer. They are; though the ties are more frequently eight feet long.

Question 59. Have you gone over any portion of the line of the Fort Scott and Allen County railroad besides that in Bourbon county?

Answer. I have gone over all of it in 1872.

Question 60. Have you examined the line from Fort Scott to the west line of Bourbon county, with reference to its practicability to the entire route of the road to Humboldt and the general direction of the same and the destination to be reached?

Answer. I have.

Question 61. Have you as an engineer run experimental parallels with instruments to ascertain if the difficulties of grade in Bourbon county would not be more than counter-balanced by other difficulties by the adoption of another line with reference to this through route?

Answer. I have run no parallel lines whatever.

Re-examination by defendants' solicitor:

Question 62. What was the grade of construction on the lines of

the Kansas City, Fort Scott and Gulf railroad and the Missouri, Kansas and Texas railroad, to which you have referred, through this county and this section of country?

(Objected to by complainant's solicitor as immaterial.)

Answer. The maximum on the Missouri, Kansas and Texas was one per cent., or fifty-two and eighth-tenths feet per mile. On the Kansas City, Fort Scott and Gulf railroad about forty feet per mile.

Question 63. In the construction of a railroad is it ready for the iron without having any ties?

(Objected to by complainant's solicitor as immaterial.)

Answer. Certainly not.

146 Question 64. In your examination and measurement of the route, the old grade where the railroad of the Fort Scott and Allen County Railroad Company was located through this county, as recently made by you, as before stated, is it not a fact that that examination and measurement was not with reference to the condition of the grade as you found it, but for the purpose of determining the cost of constructing a fair average grade on the line of that grade at the time of the construction of the old one?

(Objected to by complainant's solicitor as incompetent, immaterial, and irrelevant.)

Answer. My measurement and estimate was made without reference to what had been done farther than by marking out the alignment of the same, but was made for the purpose of determining the cost of constructing an average road thereon at the time the old grade was built.

Question 65. In making your estimate please state the kind and character of bridges and bridge-work you estimated.

Answer. My estimate was based upon all bridges being upon what is known as the trestle plan, built of wood, such as are usual in such places.

Question 66. You have stated that the cost of constructing a fair average grade in 1871 and 1872 along the line of that old grade, exclusive of the right of way and ties, was about five thousand dollars per mile. If you made an exact estimate please state the exact figures.

(Objected to as before as immaterial.)

Answer. I did, and made the exact amount five thousand and thirty-seven dollars and forty-five cents per mile.

Question 67. If that estimate did not include the building of a bridge across the Marmaton river, in order to bring the road into the city of Fort Scott at that time, how now much would a fair average bridge have then cost?

(Objected to as before as immaterial.)

147 Answer. I did not include the Marmaton bridge in the estimate. A fair, average bridge referred to would have cost at that time about ten thousand dollars.

C. G. WAITE.

R. P. RICE, being produced and first cautioned and solemnly sworn by me, on his oath says:

Question 1. ——.

—. My name is R. P. Rice; age, twenty-five years; residence, Fort Scott, Kansas; have resided here since last June; occupation, printer and publisher and one of the present proprietors of the Fort Scott Monitor, now owned by the firm of J. H. Rice and Sons.

Question 2. Have you in your possession here in Fort Scott the bound files of the Fort Scott Monitor, weekly and daily, from its first publication to the present time, and especially of the Fort Scott Weekly Monitor for the year 1869?

Answer. I have what appears to be the complete files from the time the paper was first started to the present time. There may be a few numbers missing. I now hold in my hands what is evidently a complete file of the Fort Scott Weekly Monitor for the year 1869.

Question 3. Please state if you find in the files of the Fort Scott Weekly Monitor newspaper, to which you have referred, what purports to be a notice of a call for a railroad bond election; and, if so, will you attach a copy cut out of those files of such numbers?

(Objected to by complainant's solicitor as immaterial, irrelevant — incompetent.)

Answer. I do find such a notice and herewith attach to this deposition a copy thereof cut out of issue of said newspaper of August 4th, 1869, which is number forty-two of that year. The said notice, hereto attached, appears to have been published in said news-
148 paper in the issue of July 28th, 1869, number forty-one of that year; in the issue of August 4th, 1869, number forty-two of same year; in the issue of August 11th, 1869, number forty-three of same year, and of August 18th, 1869, number forty-four of same year. These are the only issues of said paper in which that notice appears.

I hereby certify that the notice referred to by witness, R. P. Rice, is hereto attached and marked Exhibit "A."

[SEAL.] W. J. BAWDEN,
Notary Public.

No issue of the Daily Monitor was published at that time, the first number of said daily being issued November 9th, 1869.

Question 4. State if you find in the issue of the July 28th, 1869, of said newspaper, being number forty-one of said year, an editorial referring to said notice of election; and, if so, will you please cut said editorial out and attach it hereto as a part of your deposition?

(Objected to by complainant's solicitor as immaterial, irrelevant, and incompetent.)

Answer. I do find such an editorial in that issue, which I have hereunto attached, marked "Exhibit B," and make the same a part of my deposition.

R. P. RICE.

I hereby certify that said editorial above mentioned by witness, R. P. Rice, is hereto attached and marked "Exhibit B."

[SEAL.] J. W. BAWDEN,
Notary Public.

D. R. COBB, of lawful age, being produced, cautioned, and by me first solemnly sworn, on his oath deposes and says:

My name is David R. Cobb; my age is fifty-nine years; my residence is at Marmaton, Bourbon county, Kansas; my occupation, a farmer. I have resided at my present place of residence twenty-five years.

149 Question 2. State if you were a member of the board of county commissioners of Bourbon county, Kansas, at any time. And, if so, what year?

Answer. I was elected in the fall of 1868, as I now remember, and served two terms. I was a member of the board in 1869, in 1870, and 1871.

Question 3. What newspaper was the official paper of that county in 1869?

Answer. The Fort Scott Weekly Monitor.

Question 4. In case your board made no special order to the contrary, in what newspaper would public and official notices of your board be published at that time?

(Objected to by complainant's solicitor as immaterial, irrelevant, and incompetent.)

Answer. In The Fort Scott Weekly Monitor.

Question 5. Calling your attention to the printed notice, marked "Exhibit A," attached to the deposition of R. P. Rice, a witness in this case, I will ask you to state whether that is the official notice of the bond election mentioned in the order of July 23rd, 1869, a copy of which order is marked "Exhibit A" and attached to the deposition of L. B. Welch, a witness in this case.

(Objected to by complainant's solicitor on same grounds as last question.)

Answer. I think it is.

Question 6. If more than one question was discussed by the people and understood to be pending for determination in that bond election you may state what those questions were.

(Obj. to as before.)

Answer. There were two questions. There was a doubt as to the legality of the vote for issuing bonds to the Tebo and Neosho road as canvassed by a former board of commissioners, and to own that this vote was taken with two propositions in it. This vote was taken in pursuance to this order of July 23rd, 1869, before referred
150 to. Both of these questions were discussed by the people and understood by them to be pending for determination at that election. It was understood by the people that if this bond election carried then the county commissioners were to issue bonds to the

Tebo and Neosho railroad pursuant to the vote of May 7th, 1867, and also to issue bonds to this East and West road referred to in said order of July 23rd, 1869.

Question 7. Calling your attention to the proceedings of your board of county commissioners of the date of August 27th, 1869, as set out in said "Exhibit A," attached to the deposition of L. B. Welch, please state if the bonds which you say were to be issued to the Tebo and Neosho Railroad Company are the bonds mentioned in the order of May 7th, 1867, in the recitals set out in said proceedings of August 27th, 1869?

(Objected to by complainant's solicitor as immaterial, incompetent, and irrelevant.)

Answer. They are.

Question 8. State what your board of county commissioners did with reference to the issuance of bonds to the Tebo and Neosho Railroad Company and upon what authority you acted.

(Objected to by complainant's solicitor on same grounds as last question.)

Answer. We afterwards issued the bonds to the Tebo and Neosho Railroad Company to the amount of one hundred and fifty thousand dollars; we considered we were authorized to do so from the result of the election of August 24th, 1869, and acted upon that authority.

Question 9. If you know who made the actual delivery of these bonds of the Tebo and Neosho Railroad Company, you may — who it was delivered them, and to whom they were delivered for said company.

(Objected to by complainant's solicitor on same grounds as before.)

151 Answer. I think they were delivered by myself and Mr. C. Fitch, the then county clerk, and I think we delivered them to Mr. Ladue, attorney of the road.

Question 10. State whether the line of the road mentioned in the order of July 23rd, 1869, was expected to run through Marmaton township, in which you then lived.

Answer. It was, and the grade was afterward located through that township by the Fort Scott and Allen County Railroad Company.

Question 11. State through what townships the Fort Scott and Allen County Railroad Company located its grade in this county, and through what township the Tebo and Neosho, afterwards known as the Missouri, Kansas and Texas Railroad Company, located its road.

(Objected to by complainant's solicitor as immaterial, irrelevant, and incompetent.)

Answer. The Fort Scott and Allen county road commenced at Fort Scott and run some three miles west through Scott township, then eight miles through Marmaton township, and some ten miles or more through Marion township. The Tebo and Neosho road run throgh Scott township diagonally across the corner of Marmaton

township, and through Pawnee township; also across the corner of Walnut township.

Question 12. Were you acquainted with one Joseph S. Emmert, whose deposition is on file in this case? If so, what official position did he occupy in this county, and when?

Answer. I knew him well. He was county clerk of this county for, I think, two terms, and resigned that office during my term as county commissioner.

Question 13. Please state if he is the same Joseph S. Emmert mentioned in the order and proceedings of your board of county
152 commissioners of the date October 13th, 1870, as set out in said "Exhibit A," attached to the deposition of L. B. Welch.

Answer. He is.

Question 14. Please state whether or not said Joseph S. Emmert, the day that order was made, of October 13th, 1870, there, in the presence of your board of county commissioners, made a subscription for and on behalf of Bourbon county, Kansas, to the capital stock of the Fort Scott and Allen County Railroad Company in the amount of one hundred and fifty thousand dollars.

Answer. I do not recollect his making any subscription; my impression is he was not to make the subscription until the company had performed a satisfactory amount of work on the grade and until the condition set out in that order was complied with.

This question and answer objected to upon the ground that the witness is not competent to testify as to the fact, and further that the order of October 13th, 1870, is in writing and speaks for itself, and the answer made is an attempted construction of the language of that order.

Question 15. Do you mean to say that it is your impression and recollection that said Joseph S. Emmert did not at that time make such subscription?

(Objected to for same reasons as above.)

Answer. I don't recollect about it; my impression is he did not.

Question 16. Did you or Mr. D. Gardner, then also a member of your board of county commissioners, on or about June 6th, 1871, or at any other time, in your presence, state to Mr. Smith, the complainant in this case, that all of the proceedings with reference to this bond election for aid to this East and West road, afterwards organized under the name of The Fort Scott and Allen County
153 Railroad Company, were legal and valid, and assure him such bonds would be issued? State what your recollection is on that subject.

Answer. I have no recollection of ever meeting Mr. Smith.

Question 17. Do you think either you or Mr. Gardner in your presence ever made any such statements to Mr. Smith?

Answer. I have no recollection of any conversation with Mr. Smith.

Cross-examination:

Question 18. You were a member of the board of county commissioners, Mr. Cobb, at the time this proposition was submitted—to vote bonds to the railroad on the north side of the Marmaton river to the west line of Bourbon county—complied with a proposition to validate the election of May, 1867, were you not?

Answer. I was.

Question 19. How came you to submit that proposition, Mr. Cobb?

Answer. There was a request from the people in my commissioner district that influenced me.

Question 20. Did you, as such commissioner, purpose or intend to commit any fraud upon the people of Bourbon county by submitting that proposition in the form in which it was submitted, or was it done with an honest, public purpose and in good faith?

Answer. We intended to commit no frauds; it was done in good faith.

Question 21. Was the proposition fully, freely, and fairly discussed and understood by the people of Bourbon county, to your knowledge?

Answer. So far as I know, it was.

Question 22. There had been a canvass of the vote at the election in May, 1867, and the election had been declared carried. Is not that true?

Answer. That is true.

Question 23. At the time of the making of the order of
154 July 23rd, 1869, had any proceedings been begun, either in the courts or before the board, to set aside the canvass of the election in May, 1867, and declare the same invalid?

Answer. To my knowledge there had not been any action commenced in any of the courts.

Question 24. At that time that canvass then stood as part of the established records of Bourbon county, did it not, declaring the election of May, 1867, carried?

Answer. It did.

Question 25. The result of May, 1867, involved the right on the part of the commissioners to issue bonds to the Tebo and Neosho railroad, and the election in 1869 was merely intended by you, as commissioners, to ratify and confirm the authority conferred by the election in May, 1867, and no new proposition was in fact submitted. Is not this true?

Answer. That is true.

Question 26. Upon the faith of such ratification and confirmation, and upon the performance of the acquirements of the proposition of May, 1867, you issued the bonds to the Tebo and Neosho railroad, did you not?

Answer. We did.

Question 27. Are you prepared to state positively and within your own knowledge that Joseph S. Emmert never subscribed to the capital stock of the Fort Scott and Allen County Railroad Company in conformity to the order of the board before recited?

Answer. I am not.

Re-examination by defendants' solicitor:

Question 28. You do state it, however, as your impression and belief that Mr. Emmert did not make such subscription in the presence of your board upon the day he was appointed as subscription agent, do you not?

(Objected to by complt's solicitor as immaterial.)

155 Answer. It is my impression he did not. I do not want to say I believe he did not, as belief is founded on something more than impression.

Question 29. Was it not a matter of common knowledge among the people of this county on the 23rd day of July, 1869, and for quite a long time prior to that date that the returns from all of the townships of the election of May 7th, 1867, had not been counted & canvassed and that the vote at that election had actually been against the issuance of the bonds known as the Tebo and Neosho railroad bonds, and that such election was generally believed to invalidate the issuance of such bonds?

(Objected to as incompetent & immaterial and because the election had been declared carried by a canvass of the proper officers, which amounted to a judicial determination of all the facts involved in such canvass, which canvass was still on record and unannulled.)

Answer. Everybody knew that the Franklin township vote was not canvassed, and that if it had been canvassed the vote would have been in opposition to the issuance of said bonds, instead of in favor thereof. I do not think the validity of that election was discussed outside of the board of commissioners.

Question 30. In which of these two railroad schemes mentioned by you did the people of your township and of the township west of you take the greatest interest pending the election of August 24th, 1869?

(Objected to by complainant's solicitor as immaterial.)

Answer. They took the most interest in the Fort Scott and Allen County railroad, but voted against both quite strongly.

D. R. COBB.

There not being time to complete the taking of these depositions, the further taking thereof is adjourned until to-morrow morning, April 28th, 1883, at nine o'clock a. m., at the same place.

W. J. BAWDEN,
Notary Public.

156 SATURDAY, *April 28th*, 1883.

The taking of these depositions is hereby resumed pursuant to adjournment.

Present: Same as yesterday.

L. B. WELCH, of lawful age, being produced, cautioned, and by me first duly sworn, on his oath deposes and says:

Question 1. —.

—. My name is Lewis B. Welch; my age is forty-four years; my occupation is county clerk of Bourbon county, Kansas; have been such clerk ever since January 10th, 1880; my residence is Fort Scott, Bourbon county, Kansas; I have resided in this county about twenty-two years.

Question 2. State if you have in your possession as such county clerk the record of proceedings of the board of county commissioners of said county from and including the year 1867 up to the present time, and including the record and proceedings of said board with reference to an election with reference to the issuing one hundred and fifty thousand dollars of the bonds of said county and subscribing that amount to the capital stock of any railroad company now organized or that shall be organized hereafter that shall construct a railroad commencing at a point on the Tebo and Neosho railroad running westward via Fort Scott as ordered to be held on the 7th day of May, 1867, and subsequent proceedings with reference to the issuance of such bonds; and, if so, will you attach a true and complete copy of such proceedings relating to such election and the issuance of such bonds?

(Objected to by complainant's solicitor as immaterial and not relevant to any proper or lawful issue in this suit.)

Answer. I have in my possession as such county clerk the records of the proceedings just referred to, and do herewith produce and attach hereto as a part of my deposition a true and complete certified copy of all the proceedings of said board with reference to said election and the issuance of said bonds as the same appears
157 in the written records of the proceedings of the said board in my office, as also of all papers and files in relation thereto as the same now are and appear in my office, marked "Exhibit No. 1."

L. B. WELCH.

I hereby certify that the certified copy of the record of proceedings referred to by the witness, L. B. Welch, is hereto attached and marked "Exhibit No. 1."

[SEAL.] W. J. BAWDEN,
Notary Public.

CHARLES FITCH, of lawful age, being produced, cautioned, and by me first solemnly sworn, on his oath deposes and says:

Question 1. —.

—. My name is Charles Fitch; my age is fifty-three years; my occupation, deputy treasurer of Pawnee county; my residence is at Larned, in Pawnee county, Kansas; I resided in Fort Scott, Kansas, continuously from the spring of 1866 until September, 1874; I was appointed county clerk of Bourbon county, Kansas, on the 18th day of February, 1869, and filled the office until the 10th or 12th of January, 1872; I succeeded Joseph S. Emmert in said office.

Question 2. Calling your attention to "Exhibit A," attached to the deposition of L. B. Welch, as taken on the 12th day of August,

1882, it appears that the notice of the election, as ordered upon the 23rd of July, 1869, is not included in said "Exhibit A." Will you please state if the printed notice marked "Exhibit A" and attached to the deposition of R. P. Rice is the notice of that election, as published by you as county clerk?

(Objected to by complainant's solicitor as immaterial.)

Answer. It is, unquestionably.

Question 3. What newspaper was the official paper of Bourbon county, Kansas, during the year 1869?

(Objected to by complainant's solicitor as incompetent, immaterial, & irrelevant.)

158 Answer. The Fort Scott Weekly Monitor.

Question 4. Are you the C. Fitch whose name appears signed as county clerk to that notice of election?

Answer. I am.

Question 5. Calling your attention to the entry in said "Exhibit A," attached to the deposition of the said L. B. Welch, of the proceedings of said board, of date of October 13th, 1870, appointing Joseph S. Emmert subscription agent to subscribe one hundred and fifty thousand dollars for and in the name of Bourbon county, Kansas, to the capital stock of the Fort Scott and Allen County Railroad Company, I will ask you to state if you was present as such county clerk at that session of said board on that day.

Answer. I was.

Question 6. Please state whether said Joseph S. Emmert did on that day, in the presence of said board, make such subscription to the capital stock of the Fort Scott and Allen County railroad.

(Objected to by complainant's solicitor as incompetent.)

Answer. I cannot be positive on that. I believe he did not.

Question 7. Please state if it is not a fact that there was considerble discussion and controversy on that day between the board of commissioners and the officers of the railroad company with reference to that matter.

(Objected to by complainant's solicitor as incompetent, irrelevant, and immaterial.)

Answer. Whenever the questions came up they were freely discussed. I cannot give the names of those who were present that day, but there was some discussion that day. It was freely discussed that day.

159 Question 8. Calling your attention now to the entry of July 2nd, 1870, of the proceedings of said board of commissioners, as set out in "Exhibit No. 1," attached to the deposition of L. B. Welch, taken to-day in your presence, appointing J. S. Emmert trustee for the delivery of one hundred and fifty thousand dollars of the bonds of said county to the Tebo and Neosho Railroad Company, I will ask you to state if you remember the fact of his being appointed such trustee.

(Objected to by complainant's solicitor as immaterial, incompetent, and irrelevant.)

Answer. I was present and recollect the appointment.

Question 9. Please state whether or not such bonds did, in fact, pass into the possession of said J. S. Emmert, and what, in fact, was done with reference to the delivery thereof—by whom were they delivered and to whom? State the facts and circumstances.

(Objected to by complainant's solicitor as immaterial, incompetent, & irrelevant.)

Answer. The name of the company was changed to the Missouri, Kansas and Texas Railroad Company, who used such diligence in the construction of their road to Fort Scott that the bonds never went into the custody of J. S. Emmert, and I delivered the bonds myself to P. A. Ladue, with the written consent of David R. Cobb, acting chairman of the board, on the 5th day of November, 1870, at my office in the court-house, in the city of Fort Scott, Kansas, all of which was afterward reported to the board of commissioners and approved by them and entered in the proceedings of the board of January 2nd, 1871.

Question 10. Please state whether a profile and map of the Fort Scott and Allen County railroad was at any time filed in your
160 office during the period you was such county clerk

(Objected to by complainant's solicitor as incompetent and not the proper way to prove the fact.)

Answer. I am positive there was no map or profile of that road filed in my office at any time during my official terms.

Cross-examination by complainant's solicitor:

Question 11. Are you prepared to state positively and from your own knowledge that Joseph S. Emmert did not subscribe to the capital stock of the Fort Scott and Allen County Railroad Company in conformity to the resolution appointing him as the agent of the county so to do?

Answer. From my own positive knowledge, I cannot state, but as to that particular day, before referred to in my testimony, I am fully satisfied he did not subscribe.

CHARLES FITCH.

J. H. BROWN, of lawful age, being produced, cautioned, and by me first solemnly sworn according to law, deposes and says:

My name is James H. Brown; my age is fifty-one years; my residence is and has continuously been, since December, 1866, ——. I am the county treasurer of Bourbon county, Kansas, and have been such treasurer ever since the second Tuesday of October, A. D. 1880. I was county clerk of said county of Bourbon from the second Monday in January, 1872, to the second Monday of January, 1880.

Question 2. State whether any profile and map of the Fort Scott and Allen County railroad or of the Fort Scott, Humboldt and

Western railroad, as it was afterwards known, was filed in your office during the time you was such county clerk.

(Objected to by complainant's solicitor as incompetent.)

Answer. There was none filed during my term.

JAMES H. BROWN.

G. B. PHINNEY, of lawful age, being produced, cautioned,
161 and by me first duly worn according to law, says:

Ques. 1. ——.

—. My name is George B. Phinney. My age is thirty-eight years. My place of residence, Fort Scott, Kansas. My occupation is that of civil engineer.

Question 2. State if you were connected with the St. Louis, Fort Scott and Wichita railroad; and, if so, in what capacity.

Answer. I was, as civil engineer. My position was that of chief engineer.

Question 3. How much of the old grade of the Fort Scott, Humboldt and Western railroad in this county did your company make use of in building their road?

Answer. About eighteen miles from Fort Scott, west.

Question 4. What was the condition of that old grade when your company commenced work on it?

(Objected to by complainant's solicitor as immaterial & incompetent.)

Answer. Most of the cuts were narrow. The banks were narrow; they run from seven to eight feet wide on top. There were some very heavy grades—seventy-five to ninety feet to the mile.

Question 5. State if the condition of the cuts and embankments was such as to show that it never had been constructed to the usual and necessary width for railroad purposes; and, if so, how you know it to be so.

(Objected to by complainant's solicitor on the ground that the question leads and suggests the answer of the witness, and because the same is irrelevant and immaterial.)

Answer. If for a narrow-gauge road it might have been of sufficient width, but not for a standard gauge. I know it because the material was not at the bottom of the slopes at the fills that would have been there had it been constructed of sufficient width for a standard gauge.

162 Question 6. State about how much was necessary to be done on that old grade occupied by your road in order to utilize it.

Answer. About one thousand dollars per mile for the grading outside of the bridging, and one thousand to twelve hundred per mile for bridging.

Question 7. State to what extent this additional expenditure was made necessary by reason of insufficiency of the original work.

(Objected to by complainant's solicitor as immaterial, incompetent, & irrelevant.)

Answer. The whole of it.

Question 8. Was there anything in the condition of the old grade, beyond the point where your road now leaves it to the west line of this county, as a reason why your company abandoned it? And, if so, state what it was.

(Objected to by complainant's solicitor as immaterial and incompetent.)

Answer. The expense of getting it in condition and getting a cheaper line the other way. It was expensive to get it in order, and cheaper to build a new line where we did.

Question 9. State why it would have been so expensive to make use of that old grade.

(Objected to as before, as incompetent.)

Answer. On account of the heavy grades that would have to been cut down through rock, and the condition of the bank, which was nearly all gone from there to the Marmaton cossing, and the putting in a Howe truss at the Marmaton, which we got rid of by that route. I remember now that the Marmaton crossing is not in this county.

Question 10. Was not the cost of this kind of railroad work greater in 1871 and 1872 than at the time your road was built, and how much greater?

Answer. I know, in Illinois, where I was then working, it
163 was then very much greater than at the time our road above mentioned was built, in 1881 and 1882.

Cross-examination by complainant's solicitor:

Question 11. When did you first go over this line, Mr. Phinney?

Answer. About two years and a half ago.

Question 12. Did you make those measurements of which you speak at that time?

Answer. I did not.

Question 13. When did you make them?

Answer. When I relocated the line on the old grade, two or three months after.

Question 14. Do you know how long this grade had been constructed when you first saw it?

Answer. I do not.

Question 15. Could you find in the general direction your line traversed any line parallel with this grade—and when I say parallel I mean running in the same general direction—that would have been cheaper, more available, and would have furnished better grades over which to construct a railroad?

Answer. Yes, sir; I did.

Question 16. Why, then, did you determine to utilize the work of the old road?

Answer. Because that was not left to me.

Question 17. I understand you to say that you were chief engineer of the road. Is it not the duty of that officer of the road to make preliminary and trial surveys, and from them to choose and determine the best line for a railroad and to locate the same?

Answer. That is generally the case; in this case it was not.

164 The company decided on the line. I told them I thought it would be better to relocate the road than to build on the old grades. They, however, chose the other.

Question 18. In the maintenance of the track of a railroad is it not customary immediately after the completion of a new line of road to keep in employment a much larger force of track laborers to surface up, straighten, and perfect the work than later after such work has been done?

Answer. Yes; from two to three men to the section.

Question 19. What is the character of the earth for the most part through which the excavations are made and which is used upon the dumps or fills along the eighteen miles traversed by the St. Louis, Fort Scott and Wichita railroad?

Answer. The banks are mostly of black soil and clay; mostly black soil. The cuts are through clay and some rock and a little solid rock.

Question 20. What is the character of the earth used in the fills, so far as relates to its quality of close and solid packing in place?

Answer. It is generally good.

Question 21. Did you make actual measurements over the entire eighteen miles as to the extent of the work remaining undone on that grade?

Answer. It was cross-sectioned under my charge.

Question 22. What is your experience of the loss or determination of earthwork of the character you describe after being set up and abandoned to the elements for a period of eight or nine years?

Answer. I am not familiar enough with old roads to answer that question satisfactorily.

Question 23. You have testified that it cost your company from two thousand to twenty-two hundred dollars per mile to grade and bridge this eighteen miles of this old road used. How much

165 would it have cost per mile to have produced a similar amount of work upon a new line through the same section of country?

Answer. About four thousand to four thousand five hundred dollars per mile.

Question 24 Does that estimate include the necessary culverting upon such new line of road?

Answer. Of course that is included.

Question 25. Did you go over the entire line of this old grade and make measurements from a point west of the county line to Humboldt, Kansas?

Answer. Only seven or eight miles the other side of the county line.

Question 26. What is your present employment?

Answer. I am city engineer of the city of Fort Scott.

Question 27. How long have you been in that employment?

Answer. About two months.

Re-examination by defendant's solicitors:

Question 28. What was your understanding as to the time when this old grade was constructed?

Answer. About ten years before our company took it.

Question 29. Is it not the fact that your company built its road to Iola instead of Humboldt largely because of the fact that it could and did obtain a considerable amount of municipal aid bonds, if it built to that point, from municipalities in Allen county?

(Objected to by complainant's solicitor as incompetent, immaterial, & irrelevant.)

Answer. That was one reason, and also to avoid the heavy grades on the other line.

G. B. PHINNEY.

166 E. M. HULETT, of lawful age, being produced, cautioned, and duly sworn according to law, on his oath deposes and says:

Question 1. ——.

—. My name is E. M. Hulett; my age is forty-three years; my residence, Fort Scott, Kansas; my occupation, a lawyer.

A paper here shown witness, which he is asked to attach as a part of his deposition, which I certify is accordingly done and marked "Exhibit A."

[SEAL.] W. J. BAWDEN,
Notary Public.

Question 2. I will ask you to state if you are the E. M. Hulett whose name is subscribed to said "Exhibit A" as one of the directors of the Fort Scott and Allen County Railroad Company?

A. I am.

Question 3. Who, of the parties named in said Exhibit A as constituting the first board of directors, were then residents of Bourbon county, Kansas?

Answer. B. P. McDonald, George A. Crawford, John G. Stuart, John S. Redfield, S. A. Manlove, L. P. Foster, E. Jones, John W. Wells, and myself.

Question 4. How long did those parties continue in the directory of that company?

Answer. I think all of them did until it was changed to the name of The Fort Scott, Humboldt, and Western Railroad Company, and after that the most of them continued as long as the Fort Scott, Humboldt, and Western Railroad Company preserved an organization or transacted any business. I think all continued, except L. P. Foster and John W. Wells; my impression is that they dropped out.

Question 5. When did your board of directors cease to meet or to do any business?

Answer. I think it was in the summer or fall of 1872.

Question 6. State whether your relations or representative
167 character, as one of the directors of that company, or of any of the other directors who resided in this county, changed in any respect from the time the company was organized until it finally ceased to act.

Answer. I do not think they did.

Question 7. What resources, if any, did your company have other than the alleged subscription of Bourbon county, from the first of June, 1871, until your company ceased to act, for the purpose of constructing the road through this county and other expenses of the company?

Answer. We had and counted as our resources for the building — that road some bonds voted by townships in Allen county and of Humboldt City. We also had some mortgage bonds that we issued. There was about sixteen thousand dollars of mortgage bonds issued, all of which was expended in Allen county and in the city of Humboldt. The corporation had no other resources.

Question 8. What portion of those resources were available for use in Bourbon county?

Answer. We had appropriated one hundred thousand dollars of the Bourbon county bonds, to be paid to Franklin C. Smith when he had completed his contract from the city of Fort Scott to the bluffs on the western border of this county, and twenty-five thousand more of them upon the completion of his contract from those bluffs to the city of Humboldt, and also all of the bonds of Humboldt and the township of Allen county upon completion of the last-mentioned portion of the line. The other twenty-five thousand dollars of Bourbon county bonds, together with the entire mortgage bonds of, I think, sixteen thousand dollars per mile, were appropriated to one Shepherd in a contract with him for the purpose of securing the right of way, tying, ironing, and operating the railroad. The only portion of those mortgage bonds we could ever negotiate was about sixteen thousand dollars.

168 Question 9. What portion of your road, if any, was completed and ironed?

Answer. That portion that connected the Missouri, Kansas and Texas railroad with the Leavenworth, Lawrence and Galveston railroad in the city of Humboldt, Kansas, a distance of about one mile, and that only.

Question 10. State whether the complainant assigned his contract and the rights accruing thereunder to any party; and, if so, to whom and when.

(Objected to by comp. solicitor on the ground that it is incompetent, immaterial, and irrelevant.)

Answer. I think it was in 1871 that Messrs. Ray and Whitney came to the board of directors of the railroad company with an order from F. C. Smith or F. C. Smith & Co., directing the railroad company to pay to Ray and Whitney all bonds or moneys that might be coming to him, or might thereafter come to him, under his con-

tract with the railroad company upon their completion of said contract in accordance with the terms thereof. I do not know the exact date, but it was just before Ray and Whitney did any work. That order was received by the president of the company, John S. Redfield. The board was called together by said president, and the company concluded to accept it, and did so. When Ray and Whitney claimed they had completed the contract in accordance with the terms thereof they called upon the board and demanded the Bourbon county bonds in accordance with the provisions of the contract, amounting to one hundred and twenty-five thousand dollars. The board appointed a committee to go to the board of county commissioners and get the bonds. I was one of the committee. The committee went there & met the board of county commissioners while they were in session. The board of commissioners said they would take it under consideration and give us an answer after dinner.
169 In pursuance of that appointment the committee met them, I think, the same day. Again the county commissioners informed us they must decline to issue the bonds.

Question 11. What has become of that order given by Franklin C. Smith to Ray and Whitney, above mentioned by you?

Answer. I do not know.

There not being time to complete the taking of these depositions, the further taking of the same is adjourned until Monday morning, April 30th, 1883, at 9 o'clock a. m.

W. J. BAWDEN,
Notary Public.

MONDAY MORNING, *April 30th*, 1883.

Pursuant to adjournment the taking of these depositions is resumed.

Present: Same as on Saturday.

E. M. HULETT, being further waived by defendants' solicitor, says:

Question 12. What was the length of that old grade from Fort Scott west?

Answer. I think it was about forty-two miles.

Question 13. State whether or not condemnation proceedings for the right of way were ever instituted by your railroad company.

(Obj. to as immaterial.)

Answer. There was not.

Question 14. What was about the cost of right of way per mile at that time?

Answer. In this county it was about five hundred dollars per mile. I know that by some that was acquired by purchase.

Question 15. About how much right of way did your company acquire?

(Objected to by complainant's solicitor as immaterial and incompetent.)

Answer. About six or eight miles.

Question 16. What position other than director did you hold as to the railroad company?

Answer. I was attorney of the corporation.

Question 17. Please state your recollection as to whether or not a subscription was made by or on behalf of Bourbon county,
170 Kansas, to the capital stock of the railroad company before mentioned.

(Objected to by complainant's solicitor as incompetent, immaterial, and irrelevant.)

Answer. My recollection is indefinite, but my impression is that there was no subscription made in behalf of the county.

Cross-examination by complainant's solicitor:

Question 18. Are the names of those gentlemen appended to the charter which has been introduced and of those who constituted the directory of the Fort Scott and Allen County and the Fort Scott, Humboldt and Western Railroad Company during its actual existence—are there any who were not at that time citizens of Fort Scott and Bourbon county?

Answer. Some of them were not citizens of Bourbon county or Fort Scott; some were Allen county men; all were either citizens of Allen or Bourbon county.

Question 19. How many were citizens of Bourbon county?

Answer. Of those who acknowledged the charter six were from Bourbon county and one from Allen; of the directors nine were from Bourbon and three from Allen county.

Question 20. Of those who appear as incorporators and directors from Bourbon county, may it not be truly said that they are all representative citizens of the wealth, enterprise, and business intelligence of Bourbon county?

Answer. They were substantial men both socially and financially, and in that respect representative men.

Question 21. Did the people of Bourbon county or not regard the extension of a road westwardly from Fort Scott, as proposed by the charter of the Fort Scott and Allen County Railroad Company, as a desirable, valuable, and important connection?

171 Answer. I think no one was opposed to the railroad, but there was a great deal of opposition to the voting of bonds and the policy of issuing bonds for that purpose.

Question 22. Is it not true that the gentlemen who constituted the Bourbon county part of the promotors and directors of this railroad went into this enterprise largely to benefit the community in which they lived, and in a public-spirited way rather than for personal gain or advantage?

Answer. Yes. It was distinctly expressed frequently by those men that their purpose was to build a road and not to make an individual gain of it any further than they would gain by being a portion of the community.

Question 23. Who drafted the contract with the complainant and

his associates, as mentioned and set out in complainant's bill of complaint?

Answer. I did.

Question 24. Did you, at the time of drafting that contract, believe, and did the company whom you represented in that behalf believe, that you had a right to contract for the actual construction of the work and to offer and agree to pay as consideration therefor the bonds to be issued by Bourbon county under the election of August, 1869?

Answer. Yes, I did; and I think all the members of the corporation did.

Question 25. You are the Mr. Hulett, counsellor-at-law, who appears as one of the solicitors of the defendant, The Board of County Commissioners of Bourbon County, in this controversy, are you not?

Answer. I am; but I have had no connection with the case for about a year past, having retired from the practice of the law at that time.

E. M. HULETT.

172 B. P. McDONALD, of lawful age, being produced, cautioned, and by me first solemnly sworn according to law, on his oath says:

My name is Benjamin P. McDonald; my age is forty-three years; my residence, Fort Scott, Kansas.

Question 1. State if you are the B. P. McDonald whose name appears in the charter of the Fort Scott and Allen County Railroad Company as one of its directors.

Answer. I am.

Question 2. State if your relations or representative character as director in that company or as director in the Fort Scott, Humboldt and Western Railroad Company, as it was afterwards known, changed in any respect during the time the corporation continued to act.

(Objected to by complainant's solicitors as immaterial.)

Answer. No; they did not.

Question 3. The last witness, Mr. E. M. Hulett, has testified, in your presence, with reference to an order having been given by F. C. Smith or F. C. Smith & Co. to Ray & Whitney for all the proceeds and consideration of the complainant's contract by him mentioned. Please state your recollection with reference to that order.

(Objected to by complainant's solicitor as incompetent, immaterial, and irrelevant.)

Answer. Mr. Hulett's statements are true and correct, as I remember them.

Question 4. State what your recollection is as to whether or not a subscription was in fact made by or on behalf of Bourbon county, Kansas, to the capital stock of the Fort Scott and Allen County Railroad Company or of the Fort Scott, Humboldt and Western, as it was afterward called.

(Objected to by complainant's solicitor as incompetent, immaterial, and irrelevant.)

Answer. I do not think it ever was made; that is my recollection.

173 Question 5. State if you were engaged in banking business in Fort Scott, Kansas; and, if so, at what time?

Answer. I was; from 1860 to 1880.

Question 6. State what the value of Bourbon county railroad aid bonds was in 1871 and 1872, as near as you can remember.

(Objected — by complainant's solicitor as immaterial and irrelevant.)

Answer. About sixty cents on the dollar.

Cross-examination by complainant's solicitor:

Question 7. Were you in the board of directors at the time the contract was made with Franklin C. Smith & Co. to construct the road-bed of this road?

Answer. I think I was.

Question 8. Did you, as such director, advise and order the making of such contract?

Answer. I think I did.

Question 9. Did you at that time understand and believe your company to be authorized to make a contract for the construction of this road and to offer and agree to pay in consideration therefor the bonds to be issued by Bourbon county under the vote of August, 1869?

Answer. Yes; provided we complied with our contract with Bourbon county, which entitled us to the bonds.

Question 10. Did you believe yourselves to be entitled to the bonds upon the performance of that contract by Franklin C. Smith & Co. in accordance with the terms and specifications of the same?

Answer. Not to the best of my recollection.

Question 11. I hold in my hand the original contract now in evidence in this case, and read therefrom the following: "And the party of the first part hereby agrees to pay to said parties

174 of the second part the further sum of one hundred thousand dollars in bonds at par of Bourbon county, Kansas, and seventy thousand dollars in bonds at par of Humboldt township, Kansas, when the said road-bed shall be completed and the necessary and proper bridges, culverts, water-courses, ditches, and cattle-guards shall be fully built according to the terms of this contract by the parties of the second part from said point in the city of Fort Scott on to the Bluffs, in the eastern portion of Allen county, on the west side of the Marmaton river and to pay to said parties of the second part when the balance of said road-bed, to wit, from the line of said L., L. and Galveston railroad in Humboldt township, Allen county, Kansas, to the before-named point on the Bluffs, in the eastern portion of Allen county, Kansas, — fully completed and united according to contract, with all necessary bridges, culverts,

water-courses, ditches, and cattle-guards, the further sum of twenty-five thousand dollars in bonds at par of Bourbon county, Kansas." How, if you remember, did the railroad company propose to acquire possession of the bonds so as to comply with this provision of the contract?

Answer. I do not remember exactly, but I suppose by complying with the conditions on which the bonds were voted.

Question 12. Had the company at the time of entering into that contract any other resources than those bonds, or did they propose to acquire any other resources, and, if so, how, to comply with the provisions of the subscription?

Answer. Nothing but our mortgage bonds and stock, I believe; I do not remember any other resources.

Question 13. Was there at that time any fund arising from individual stock subscriptions; and, if so, how much?

Answer. I do not remember whether there was or not.

175 Question 14. Were those who composed the directory at that time from Bourbon county, Kansas, citizens representative of the wealth, enterprise, and business intelligence of said county or not?

Answer. They were fair representative men.

Question 15. What business position did you occupy at that time?

Answer. I was president of the First National Bank of Fort Scott.

Question 16. Was there any other bank in Fort Scott at that time?

Answer. I think there was a private bank at that time.

Question 17. Who was George A. Crawford?

Answer. He was a prominent business man of Fort Scott, and at various times was president of the Fort Scott Town Company; was proprietor of the Fort Scott Foundry and the "Fort Scott Monitor."

Question 18. Who was John G. Stuart?

Answer. He was in the wagon-making business and was a speculator.

Question 19. Who was John S. Redfield?

Answer. A practicing physician.

Question 20. Who was S. A. Manlove?

Answer. I think he — deputy collector of internal revenue at that time.

Question 20½. Who were L. P. Foster, E. Jones, and John W. Wells?

Answer. They were farmers and merchants in the country districts of Bourbon county.

Re-examination by defendants' solicitor:

Question 21. You speak of the necessity of complying with the contract of the railroad company with Bourbon county. Please explain what you meant.

Answer. I meant that before we were entitled to any bonds it was necessary for us to comply with the conditions on which the bonds were voted.

Question 22. Is it not a fact that the amount of individual
176 subscriptions to the capital stock of your railroad company was small and was used up in the general expenses of the company?

Answer. I think it was; they were small, I know, and I think all paid and used up in expenses.

Question 23. What has become of J. S. Redfield, S. A. Manlove, and George A. Crawford?

Answer. J. S. Redfield is dead; S. A. Manlove resides in Arizona Territory, and George A. Crawford in Colorado.

B. P. McDONALD.

I, W. J. Bawden, a notary public within and for the county of Bourbon, in the State of Kansas, do hereby certify that T. W. Chapman, C. G. Waite, R. P. Rice, D. R. Cobb, L. B. Welch, Charles Fitch, James H. Brown, G. B. Phinney, E. M. Hulett, and B. P. McDonald were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself in the presence of the witnesses, respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed agreement specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit, and that said depositions were commenced at the time in the notice specified and continued by adjournment from day to day, as above stated.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal this 30th day of April, A. D. 1883, at the city of Fort Scott, county of Bourbon and State of Kansas.

My commission expires March 4th, 1884.

[SEAL.] W. J. BAWDEN,
Notary Public.

177 Witness fees:

T. W. Chapman,	1 day,	1.50;	8 miles,	.80		$2	30
C. G. Waite,	2 "	3.00;	74 "	7.40		10	40
D. R. Cobb,	2 "	3.00;	16 "	1.60		4	60
Charles Fitch,	10 "	15.00	812 "	81.20		96	20
Notary's fees						42	75

Witnesses' and notary's fees paid by the defendant, Board of County Commissioners, Bourbon Co., Kansas.

"EXHIBIT A."

Railroad Election.

Proposition for $150,000 bonds to be submitted to the electors of Bourbon county on Tuesday, the 24th day of August, 1869.

At a meeting of the Board of County Commissioners of Bourbon County, Kansas, held on the 23d day of July, A. D. 1869, the following proceedings were had in relation to a railroad election, to wit:

Be it ordered by the County Commissioners of the County of Bourbon and State of Kansas, That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west north of the Marmaton river, upon the most practical route in general direction of Humboldt, Allen county, Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof, and bearing interest, payable semi-annually,
178 at the rate of seven per cent. per annum.

Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and shall have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statutes in such case made and provided, and that said question shall be submitted to said electors at a special election on Tuesday, the 24th day of August, A. D. 1869.

At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear upon a canvass of the votes cast at said election by the proper officers according to law that a majority of the votes cast upon said question are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of the bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the bonds herein provided for, with the other resources of said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county; and whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo & Neosho railroad; and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th of May, 1867, aforesaid, will be generally satisfactory to the people of the county:

It is therefore ordered and provided that the decision of this question by the qualified voters of said county at the said election in favor of such subscription shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once
179 to the Tebo & Neosho Railroad Company; and the Board of County Commissioners will accordingly in such case make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

D. GARDNER, *Ch'n of B'd*,
L. ROBERTS,
DAVID R. COBB,
Com's.

STATE OF KANSAS, }
Bourbon County, } ss:

I, C. Fitch, county clerk in and for the aforesaid county and State, do hereby certify the above and foregoing to be a correct and true copy of the original order for an election to vote for and against issuing bonds to be held on the 24th day of August, A. D. 1869, now on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal on this 23rd day of July, A. D. 1869.

C. FITCH,
County Clerk.

Notice.

The said election will be held in all respects in conformity with the general election law of the State, and the canvass will take place on the Friday next following at 10 o'clock a. m.

The ballots to be sealed up in separate envelopes and transmitted to this office with the poll-books.

By order of the board.

G. FITCH,
41w4 *County Clerk.*

Press & Post copy, each one time.
Exhibit "A."

"EXHIBIT B."

To the tax-payers of Bourbon county:

By reference to a call published elsewhere it will be seen that the County Commissioners of Bourbon county have submitted the question of subscribing more bonds in aid of railroads. The amount of bonds you are called upon to vote is $150,000, to aid in the building of a railroad through Bourbon county from east to west, up the north side of the Marmaton river, which, if carried—and we trust it will be carried—will also confirm the vote of May 7, 1867, which gave to "any railroad company which is now or may hereafter be incorporated" to connect with the Sedalia railroad on the east the sum of $150,000 in county bonds.

This, at first thought, may to some seem a large amount of bonds to give to railroads; but when we consider the advantages to be derived from it we cannot help being convinced that to vote the bonds is the best thing our county could do. It will secure beyond the possibility of a doubt a line of railroad through our entire county from east to west and will secure railroad facilities to all portions of the county. No farmer in Bourbon county will then be under the necessity of hauling grain and other farm products, at farthest, more than ten miles, while it will bring two-thirds of the citizens of the county within five miles of a depot. It will give to our county thirty miles additional railroad and three more depots in the county, besides the machine-shops of the Tebo & Neosho railroad, all of which will become taxable property. The building of the road alone

will increase the real property of the county, putting it down at the very lowest estimate, $400,000, which will pay the interest of the whole amount of bonds you are asked to subscribe to railroads. It will increase the aggregate wealth of the county at the rate of a million of dollars a year, and bring a rich class of immigrants to us, who will help pay our taxes and enrich our county. The question is submitted to you, and it is for you to say, whether Bourbon county shall be the first county in wealth and population (excepting Leavenworth) in the State, or whether it shall be a fifth, sixth, or seventh rate county.

181 Our county commissioners have so worded the proposition submitting the question of voting bonds as will guard your interest and the best interest of the county. The proposition, voting bonds to be expended on a road extending west from this place up the north side of the Marmaton, cannot be issued to another road extending in another direction. It must be expended as provided for in the call submitting the question for a vote. If you vote for the proposition you are certain of securing a railroad; if you vote against the proposition there is no certainty that you will ever get a road through the county from east to west.

Ex. "B."

182 EXHIBIT No. 1.

Railroad Election.

Proposition for $150,000 bonds to be submitted to the citizens of Bourbon county on the 7th day of May, 1867.

At a meeting of the Board of County Commissioners of Bourbon County, Kansas, on the 8th day of March, A. D. 1867, the following proceedings were had in relation to a railroad election, to wit:

Be it ordered by the County Commissioners of Bourbon County, Kansas, That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall be organized hereafter, that shall construct a railroad commencing at a point on the Tebo & Neosho railroad running westward via Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof and bearing interest at the rate of seven (7) per centum per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of the votes cast in favor of the same in pursuance of the provisions of an "Act to authorize counties and cities to issue bonds to railroad companies," approved Feb. 10th, 1865, and that said question shall be submitted to said electors at a special election on the 7th day of May, A. D. 1867.

At said election the votes shall be cast "for railroad bonds" and "against railroad bonds;" and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of

the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing
183 of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the road-bed of the Tebo and Neosho railroad is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the road-bed and connect the said point with the city of Fort Scott.

(Signed) J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIM,
Com'rs.

Attest: J. S. EMMERT, *Clerk.*

STATE OF KANSAS, }
County of Bourbon, } *ss:*

I, J. S. Emmert, county clerk in and for said county, do certify that the above is a correct copy of the order for an election to vote for and against issuing bonds to be held on the 7th day of May, 1867, now on record in my office.

In witness whereof I have hereunto set my hand and the county seal this 25th day of March, A. D. 1867.

[SEAL.] J. S. EMMERT,
County Clerk.

Railroad Election.

Proposition for $150,000 bonds to be submitted to the citizens of Bourbon county on the 7th day of May, 1867.

At a meeting of the Board of County Commissioners of Bourbon County, Kansas, on the 4th day of April, A. D. 1867, the following proceedings were had in relation to a railroad election, to wit:

Whereas a petition from the legal voters of Bourbon county has this day been presented to the board asking that the question of submitting the issuing of one hundred and fifty thousand dollars in bonds to the Tebo & Neosho R. R. Company, or any branch thereof leading from that railroad to the city of Fort Scott, be sub-
184 mitted to the qualified voters of Bourbon county for the rejection or approval on the first Tuesday (7th day) in May; and whereas said petition contains three hundred and one names, two hundred and eighty being required by law: Now, be it ordered by the County Commissioners of Bourbon County, Kansas, That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo & Neosho railroad running westward via Ft. Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within

thirty years from the date thereof and bearing interest at the rate of seven (7) per centum per annum.

Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of the votes cast in favor of the same, in pursuance of the provisions of an "Act to authorize counties and cities to issue bonds to railroad companies," approved February 10th, 1865, and that said question shall be submitted to said electors at a special election on the 7th day of May, A. D. 1867. At said election the votes shall be cast "for railroad bonds" and "against railroad bonds;" and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the road-bed of the Tebo & Neosho railroad is completed to such a point that the
185 amount of said bonds shall be sufficient and adequate to construct the road-bed and connect the said point with the city of Fort Scott.

(Signed) J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIMM,
Com'rs.

Attest: J. S. EMMERT, *Clerk.*

STATE OF KANSAS, }
County of Bourbon, } *ss:*

I, J. S. Emmert, county clerk in and for said county, do hereby certify that the above is a correct copy of the order for an election to vote for and against issuing bonds to be held on the 7th day of May, 1867, now on record in my office.

In witness whereof I have hereunto set my hand and the county seal this 25th day of March, A. D. 1867.

[L. S.] J. S. EMMERT,
County Clerk.

24 Td.

Transcript of Journal, Board County Commissioners of Bourbon County, Kansas, Relating to Tebo & Neosho R. R. Book A, Record Bourbon County, K. Ter.

FORT SCOTT, *May 10th*, 1867.

The board met pursuant to adjournment.

Present: A. C. Primm and C. W. Johnson, commissioners.

And J. S. Emmert, clerk, proceeded to canvass the returns of the election held on the 7th day of May, A. D. 1867, with the following:

Township.	For railroad bonds.	Against R. R. bonds.
Osage	Eight (8)	Fifty-five (55).
Freedom	Three (3)	Ninety-four (94).
Timberhill	Four (4)	One hundred & forty (140).
Marion	Fourteen (14)	Seventy-four (74).
Scott	Four hundred & eleven (411)	Seven (7).
Marmaton	Twenty (20)	Forty-nine (49).
186 Drywood	Eight (8)	Seven (7).
Pawnee	(00)	Sixteen (16).
Total	468	442

Majority for bonds, 26 votes.

And it was declared that there was a majority of twenty-six votes cast for R. R. bonds; and it is also further certified that there was no evidence of an election having been held in the townships of Franklin and Walnut.

FORT SCOTT, *July 23rd*, 1869.

Board met pursuant to adjournment.

Present: Full board.

The following proceedings were had under application from officers and directors of the Tebo and Neosho Railroad Company to the board to subscribe stock to said railroad, to wit: Application being made to the board by the officers and directors of the Tebo and Neosho Railroad Company to subscribe stock to said railroad company to the amount of $150,000.00 in pursuance of the railroad election held May 7th, 1867, the board, upon mature consideration, decided that it was not advisable to make such subscription at the present time.

It is, however, further considered by the board that the following order be made in the premises:

Be it ordered by the County Commissioners of the County of Bourbon, in the State of Kansas, That there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, one

hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route, in the general direction of Humboldt, Allen county, Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from
187 the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and shall have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statutes in such cases made and provided, and that said question shall be submitted to said electors at a special election on Tuesday, the 24th day of August, A. D. 1869.

At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds;" and if it shall appear upon a canvass of the votes cast at said election by the proper officers according to law that a majority of the votes cast upon said question are in favor of said subscription, then the above order shall be carried into practical operation by the issuing of the bonds to said company whenever the county commissioners of Bourbon county are satisfied that the bonds herein provided for, with the other resources of said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county.

And whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad; and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th of May, 1867, aforesaid, will be generally satisfactory to the people of the county:

It is therefore ordered and provided that the decision of this question by the qualified voters of said county at the said election in favor of the former subscription of the 7th of May, 1867, be*ing* made at once, to the Tebo and Neosho Railroad Company, and the
188 Board of County Commissioners will accordingly in such case make the subscription authorized by said election of May the 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

D. GARDNER,
Chairman of Board,
L. ROBERTS,
DAVID R. COBB,
Commissioners.

FORT SCOTT, *August 27th*, 1869.

Board met pursuant to previous order to canvass the vote of the election held on the 24th inst. in relation to the railroad bonds.

Present: A full board.

The following is the result of the election:

Township.	For bonds.	Against bonds.
Osage	6	76
Freedom	9	114
Timberhill	18	144
Franklin	3	171
Marion	63	61
Marmaton	46	40
Scott	229	7
Fort Scott, 1st ward	504	
Fort Scott, 2nd ward	532	
Drywood	13	30
Pawnee	5	60
	1,428	703

And it was declared that there was a majority for the railroad bonds of seven hundred and twenty-five (725), and that the question was carried, subject to the conditions of the call for said election.

The propriety of subscribing stock to the Tebo and Neosho
189 Railroad Company was duly considered and the following action taken:

Whereas an election was held in the county of Bourbon and State of Kansas on the 7th day of May, A. D. 1867, upon the following proposition, to wit:

Be it ordered by the County Commissioners of Bourbon County, Kansas, That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo and Neosho railroad running westward via Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof and bearing interest at the rate of seven (7) per cent. per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of all the votes cast in favor of the same, in pursuance of an "Act to authorize counties and cities to issue bonds to railroad companies," approved February 10th, 1865, and that said question shall be submitted to said electors

at a special election on the 7th of May, 1867. At said election the votes shall be cast for railroad bonds and against railroad bonds; and if it shall appear upon a canvass of said votes by the proper officers according to law that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the County Commissioners of Bourbon County are satisfied that the road-bed of the Tebo and Neosho railroad is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the said road-bed and connect the said point with the city of Fort Scott.

190 J. R. MORLEY,
C. W. JOHNSON,
A. C. PRIMM,
Commissioners.

Attest: J. S. EMMERT, *Clerk.*

Which said proposition was declared carried on a canvass of said votes according to law, and so stands recorded on the public records of the county; and whereas some question arose afterwards as to the propriety and legality of subscribing the stock then voted to the Tebo and Neosho Railroad Company, an election was ordered and held in said county of Bourbon and State aforesaid upon the following proposition, "to wit:"

Be it ordered by the County Commissioners of the County of Bourbon and State of Kansas—

That there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized or that shall be organized hereafter that shall construct a railroad commencing at the city of Fort Scott, in the county of Bourbon and State aforesaid, running from thence west, north of the Marmaton river, upon the most practicable route in the general direction of Humboldt, Allen county, Kansas, and the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof and bearing interest, payable semi-annually, at the rate of seven per cent. per annum: Provided, That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid and shall have received a majority of the votes cast upon said proposition in favor thereof in pursuance of the provisions of the statute in such cases made and provided, and that said question shall be submitted to the said electors on Tuesday, the 24th day of August, A. D. 1869.

191 At the said election the votes shall be cast "for railroad bonds" and "against railroad bonds," and if it shall appear, upon a canvass of the votes cast at said election by the proper officers according to law, that a majority of the votes cast upon said question are in favor of said subscription then the above order shall be carried into practical operation by the issuing of the bonds to said com-

pany whenever the County Commissioners of Bourbon County are satisfied that the bonds herein provided for, with the other resources of the said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon county;

And whereas some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D. 1867, to the Tebo and Neosho railroad; and whereas it is considered that the foregoing order, in addition to the one affirmed on the 7th day of May, 1867, aforesaid, will be generally satisfactory to the people of the county, it is therefore ordered and provided that the decision of the question by the qualified voters of said county at the said election in favor of such subscription shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once to the Tebo and Neosho Railroad Company, and the board of county commissioners will accordingly in such case make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for as soon as the terms and conditions of said subscription are complied with by said railroad company.

(Signed) D. GARDNER,
Chairman of Board,
L. ROBERTS,
DAVID R. COBB,
Commissioners.

192 And whereas it appears from the canvass of the votes upon the proposition submitted on the 24th of August, 1869, that fourteen hundred and twenty-eight (1,428) votes were cast in favor of said proposition and seven hundred and three (703) votes were cast against the same; whereby the said last-recited proposition was carried by a majority of all the votes cast, and the proposition voted upon at the election of the 7th day of May, 1867, was reaffirmed:

Now, therefore, in pursuance of said vote and the authority vested in us by law, we, the Board of County Commissioners of Bourbon County, do hereby constitute and appoint W. A. Shannon our agent to represent the county before the board of directors of the Tebo and Neosho Railroad company, and we hereby authorize and empower him, the said W. A. Shannon, to subscribe one hundred and fifty thousand ($150,000) dollars to the capital stock of the Tebo and and Neosho Railroad Company in the name and for the benefit of the county of Bourbon, said subscription to be made upon the express condition, which is hereby made a part of said subscription, that the bonds of said county of Bourbon in payment of said subscription shall not be delivered to said Tebo and Neosho Railroad Company, nor shall said county become liable for the payment of any portion of said subscription of stock until the road-bed of the Tebo and Neosho Railroad Company is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct and complete the road-bed of said Tebo

and Neosho railroad from Sedalia, in the State of Missouri, to said city of Fort Scott, in the State of Kansas.

And provided further, That this subscription shall be void unless said road-bed shall be so completed from Sedalia to Fort Scott by or before the 1st day of January, A. D. 1872.

And provided further, That no interest shall accrue or be paid on said bonds until the same shall have been delivered to said
193 railroad company according to the terms and conditions before mentioned.

In testimony whereof the said Board of County Commissioners have hereunto subscribed their names and caused their seal to be affixed at the city of Ft. Scott, Kansas, on this 27th day of August, A. D. 1869.

D. GARDNER,
LAWRENCE ROBERTS,
DAVID R. COBB,
County Commissioners.

Attest: C. FITCH, *County Clerk.*

County of Bourbon to W. A. Shannon, Dr.

1869, Sept. 1.—To time going to and returning from Clinton, Mo., making subscription of stock to Tebo and Neosho R. R. Co.—

6 days @ $3	18 00
Use of carriage, 6 days @ 2.50	15 00
Expenses of self & team	16 00
	$49 00

I hereby certify that the above is correct and true.

W. A. SHANNON.

Filed Sept. 9th, A. D. 1869.

C. FITCH,
County Clerk.

Allowed, $49.00.
Oct. 6th, 1869.

D. GARDNER, *Chair.*

FORT SCOTT, *November 10th*, 1869.

Board met pursuant to adjournment.

Present: Mess*inger* Gardner and Cobb, commissioners.

* * * * * * *

Whereas the propriety and necessity of the county of Bourbon having a representative in the directory of the Tebo and Neosho Railroad Company has become manifest, it is therefore ordered that Dr. J. S. Redfield be, and is hereby, appointed by the board of county commissioners as the agent and representative of the
194 county to attend the meetings of the directors of said railroad, with authority hereby given unto him to cancel the subscription to the capital stock of said railroad if the terms as

stipulated by our agent, W. A. Shannon, shall be departed from by said railroad company, and transact any other important business for the interest of the county.

FORT SCOTT, *July 2nd*, 1870.

Board met pursuant to adjournment.

Present: A full board.

The board proceeded to the consideration of the business for which they had convened. Col. P. A. La Due, representing the Tebo and Neosho Railroad Company, was present. In view of the importance to the county of the early completion to Fort Scott of the Tebo and Neosho railroad, it was, on consideration of the board, ordered by the Board — County Commissioners of Bourbon County that there be prepared one hundred and fifty coupon bonds of the county of Bourbon, in the State of Kansas, in favor of the Tebo and Neosho Railroad Company, payable to said company or bearer, of the denomination of one thousand dollars each, bearing date the first day of July, A. D. 1870, and maturing thirty years after the date thereof, with interest at the rate of seven per centum per annum, payable semi-annually at the New York National Exchange Bank, in the city of New York, at which place the principal of said bonds shall be payable when the same matures, and that when said bonds be so prepared the same be signed by the chairman of the board of county commissioners and attested by the county clerk, under the seal of the county court, and that the coupons be signed by said chairman and said clerk, and that when so signed the said bonds, together with the coupons thereto attached, be delivered to J. S. Emmert, of Fort Scott, as the trustee of the county of Bourbon and of the said Tebo and Neosho Railroad Company, its successors or assigns, and that the said bonds be delivered to said company, its succes-
195 sors or assigns, when the conditions on which the said bonds were voted have been complied with.

Ordered further that J. S. Emmert be, and he is hereby, appointed the agent of the said county and trustee of the said company, its successor or assigns, to receive the said bonds when duly signed as aforesaid as such agent and trustee, and that he safely and securely keep said bonds until the said company, its successors or assigns, becomes entitled to the same under the conditions on which they were voted, and that he thereupon turn over and deliver said bonds to the said company, its successors or assigns, and that he enter into bonds in due form, with good and sufficient sureties, in the sum of three hundred thousand dollars ($300,000) for the faithful performance of the trust aforesaid, and that when he so deliver said bonds he shall detach therefrom all the coupons which have matured, and if none of them have matured, then such a number thereof as shall cover all the interest which shall have matured to the date of delivery of said bonds, and return the said coupons to the board of county commissioners to be canceled in their presence; ordered further that the stock of the county in the Tebo and Neosho Railroad Company be sold and assigned to the Land-Grant Railway and Trust Company of New York for the consideration of five dol-

lars ($5), and that the Board of County Commissioners sign the transfer upon the express conditions and terms as recited in the within contract this day duly executed and filed in the office of the county clerk of Bourbon county, Kansas, for the purpose above specified.

The above minutes were duly approved by the board.

C. FITCH,
County Clerk.

196 FORT SCOTT, KANSAS, *January 2nd*, 1871.

Board met pursuant to provisions of law.

Present: Mr. D. R. Cobb, chairman of board, and H. S. Ruble commissioners.

The county clerk laid before the board the receipts and other papers relating to the delivery of the $150,000 of bonds of the Tebo and Neosho Railroad Company, showing the delivery of the said bonds to have been made by the county clerk, on the order and by direction of the chairman of the board, on the 5th day of November last, coupons to the amount of seventeen hundred and fifty dollars being first detached to cover interest from July 1st to September 1st, 1870, it is ordered by the board that said delivery be hereby approved. And now this day comes P. A. La Due, Esq., agent of the said Tebo and Neosho Railroad Company, and asks that the certificate of stock issued to the county, to the amount of $150,000, dated November 26th, 1870, be assigned to Levi Parsons, trustee, for the persons composing the Land-Grant Railway and Trust Company of the City of New York, in conformity with the action of this board, taken and made by them of record on the 2nd day of July, 1870, it is now therefore ordered by the board that the assignment be so made, and all action thereto relating is hereby confirmed.

STATE OF KANSAS, }
County of Bourbon, } *ss:*

I, L. B. Welch, the county clerk in and for the county and State aforesaid, do hereby certify that the foregoing is a true and complete abstract of the proceedings of the board of county commissioners of said county relating to the issue of bonds to the Tebo & Neosho Railroad Co., including all orders relating thereto, as found recorded in the journal of said board of county commissioners, now a part of the records of my office, and also of all papers in relation thereto.

Witness my hand and official seal this 26th day of April, 1883.

[SEAL.] L. B. WELCH,
County Clerk.

197 "EXHIBIT A."

Testimony of E. M. Hulett.

The undersigned, proposing to organize under the general incorporation laws of the State of Kansas for the construction, maintaining, and operating of a railroad from the eastern boundary of the

county of Bourbon via the city of Fort Scott, in said county, thence along the north side of the Marmaton river through said county of Bourbon, and through the county of Allen to an intersection with the Missouri, Kansas, and Texas railroad at Humboldt, in said county of Allen, do hereby adopt the following as our charter:

1st. The name of this corporation is the Fort Scott and Allen County Railroad Company.

2nd. This corporation is formed for the purpose of constructing and maintaining a railroad beginning at the city of Fort Scott or at the eastern boundary of said county of Bourbon and running westerly through Bourbon county via Fort Scott up the north side of the Marmaton river through the counties of Bourbon and Allen, to an intersection with the Missouri, Kansas and Texas railroad at Humboldt.

3rd. The principal business office of this corporation shall be at Fort Scott.

4th. The term of existence of this corporation is perpetual.

5th. The number of directors or trustees of this corporation shall be thirteen, and the following-named persons shall be directors or trustees for the first year from the first of June, 1870, to wit: B. P. McDonald, George A. Crawford, E. M. Hulett, John G. Stuart, John S. Redfield, and S. A. Manlove, Fort Scott; D. B. Emmert, R. Lawrence, and Moses Neal, of Allen county; L. P. Foster, E. Jones, and John W. Wells, of Bourbon county.

6th. The capital stock of this corporation is one million
198 dollars, divided into ten thousand shares, at one hundred dollars per share.

7th. The estimated length of said road is fifty miles.

In witness whereof we have hereunto set our hands this 28th day of May, 1870.

JOHN S. REDFIELD.
E. JONES.
L. P. FOSTER.
B. P. McDONALD.
E. M. HULETT.
JOHN G. STUART.
D. B. EMMERT.

STATE OF KANSAS, } *ss:*
Bourbon County, }

On this 28th day of May, 1870, before me, a notary public in and for said county, personally appeared John S. Redfield, E. Jones, L. P. Foster, B. P. McDonald, E. M. Hulett, John G. Stuart, and D. B. Emmert, to me personally known to be the identical persons whose names are subscribed to the above certificate of incorporation, who each acknowledged the execution of the same to be their own voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

[SEAL.]

C. H. OSBORN,
Notary Public.

STATE OF KANSAS, SECRETARY'S OFFICE.

I, James Smith, secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office June 1st, 1870.

In testimony whereof I have hereunto subscribed my name and affixed my official seal.

Done at Topeka this 30th day of June, A. D. 1881.

[SEAL.] JAMES SMITH,
Secretary of State.

199 Endorsed: No. 3001. Opened at the instance & request of pl'ff's att'ys May 3, 1883. Filed May 5th, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

200 "EXHIBIT No. 2."

Warranty deed. M. S. Carter & wife to John J. Franklin, Francis Tiernan, and A. M. Ayers. Recorded this 12th day of January, A. D. 1881, at 2½ o'clock p. m. James M. Stanley, register of deeds.

Know all men by these presents that we, M. S. Carter and Isabella Carter, his wife, of the city of St. Louis, State of Missouri, in consideration of the sum of fifteen thousand dollars, as duly paid by John J. Franklin, Francis Tiernan, and A. M. Ayers, of the State of Illinois, have sold and by these presents do grant, bargain, sell, and convey to the said John J. Franklin, Francis Tiernan, and A. M. Ayers, their heirs and assigns, all and singular that portion of the railway lying and being in the counties of Bourbon and Allen, in the State of Kansas, and known as the Fort Scott, Humboldt and Western Railway Company, which said railway company has contracted or by law is authorized to construct from Fort Scott to Humboldt and from Humboldt westward to the Arkansas river, as their interest therein may appear, together with all lands and hereditaments acquired and appropriated for depots, superstructures, buildings, erections, and fixtures on the said line of railway, and all tracks, bridges, viaducts, culverts, fences, and all houses and buildings thereon or appertaining thereto, and all other property, real and personal, owned and acquired by a decree of the United States circuit court, district of Kansas, held at the city of Topeka, in and for the State of Kansas, Nov. 24th, 1874, and by virtue of the deed of the special master in chancery, Herman Markson, appointed by said court, which said deed is dated June 21st, A. D. 1875, and made in pursuance of a sale made under and by virtue—said decree of said court, wherein said M. S. Carter was plaintiff and Henry L. Shepherd, L. W.
Shepherd, Charles B. Gray, George A. Amos, D. B. Emmert, the
201 Fort Scott, Humboldt and Western Railway Company, The
Farmers' Loan and Trust Company of the City of New York, and John A. Davenport were defendants, & it being the intention of the parties hereto that the parties of the first part are to and do by these presents sell and convey to the parties of the second part, their heirs and assigns, all the rights, title, and interest in and to the

property, rights, privileges, and franchises of the Fort Scott, Humboldt and Western Railway Company as conveyed and acquired by the said M. S. Carter under and by virtue of the said decree of court and the deed of the said master in chancery made in pursuance thereof and approved by said court; to have and to hold the said premises and property rights and privileges above described unto the said parties of the second part, their heirs and assigns, to their only proper use, benefit, and behoof forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals this 8th day of May, A. D. 1880.

M. S. CARTER. [SEAL.]
ISABELLA CARTER. [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

On this 8th day of May, A. D., 1880, before me, a notary in and for said city of St. Louis, came M. S. Carter, to me personally known to be the identical person who executed the above conveyance as grantor, and duly acknowledged the same to be *their* own voluntary act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[L. S.] C. P. WALBRIDGE,
Notary Public.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this 8th day of May, A. D. 1880, before the undersigned, a notary public within and for the city of St. Louis & State of Missouri, personally came Isabella Carter, wife of
202 & 203 the M. S. Carter herein named, and who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as one of the parties thereto, and acknowledged the same to be her free act and deed for the purposes therein mentioned; and the said Isabella Carter, being by me first made acquainted with the contents of the said instrument, upon an examination separate and apart from her said husband, acknowledged that she executed the same and relinquishes her dower in the real estate the reinmentioned freely and without fear, compulsion, or undue influence of her said husband.

In testimony whereof I have hereunto set my hand and affixed my official seal, at office, in St. Louis, the day & year first above written.

[L. S.] C. P. WALBRIDGE,
Notary Public.

STATE OF KANSAS, *County of Bourbon:*

I, James M. Stanley, register of deeds in and for the aforesaid county and State, do hereby certify that the within and foregoing is a true and correct copy of a warranty deed now on record in book 30 of deeds, page 197, in my office.

In witness whereof I hereunto set my hand and affix my official seal on this 27 day of April, 1883.

[SEAL.] JAMES M. STANLEY,
Register of Deeds.

[Endorsed:] Copy. Warranty deed. M. S. Carter & wife to John J. Franklin, Francis Tiernan, A. M. Ayers.

204 "EXHIBIT No. 1."

Decree of court. Herman Markson, by court, to M. S. Cartter. Recorded on the 11th day of August, 1876, at 9 o'clock a. m. D. T. Hiatt, register.

This indenture, made this twenty-first day of June, 1875, between Herman Markson, special master appointed by the circuit court pursuant to the practice thereof, of the first part, and M. S. Carther, party of the second part, —:

Whereas, at a court of chancery held at the city of Topeka, in and for the district of Kansas, in the eighth circuit of the United States of America, on the twenty-third day of November, 1874, it was, among other things, ordered, adjudged, and decreed by the said court in a certain cause then depending in said court between M. S. Carther, complainant, and Henry L. Slefleed, L. W. Slefleed, Charles B. Gay, George A. Amos, D. B. Summert, The Fort Scott, Humboldt and Western Railroad Company, The Farmers' Loan and Trust Company of the city of New York, and John A. Davenport, defendants, that the whole of the mortgaged premises mentioned & set forth in the plaintiff's bill filed and which were prayed in said bill to be sold by and under the directions of the undersigned special master, in and by said decree for that purpose duly appointed, and in the manner in said decree specified; and

Whereas said Herman Markson, special master as aforesaid, and of the first part to these presents, in pursuance of the order and decree of said court of chancery, did, on the 16th day of February, 1875, sell at public auction, at the front door of the court-house, in the city of Iola, in the county of Allen and

State of Kansas, the said mortgaged premises hereinafter particularly described, having first given the previous notice of the time and place of the said sale as required by the decree aforesaid, at which sale the premises were struck off to the said party of the second part to these presents for the sum of eight thousand six hundred and sixty-seven dollars, that being the highest sum bidden for the same:

205

Now, therefore, this indenture witnesseth: That the said Herman Markson, special master as aforesaid and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid in pursuance of said decree, and in consideration of the premises and of the said sum of eight thousand six hundred and sixty-seven dollars, so bidden as aforesaid and paid, hath granted, bargained, and sold, released, conveyed, & confirmed, and by these presents doth grant, bargain, sell, and convey, unto the party of the

second part and to his heirs and assigns forever all and singular the portion of the railway of the Fort Scott, Humboldt and Western Railway Company which said company has constructed, or by law is authorized to construct, from Fort Scott & Humboldt and from Humboldt westward to the Arkansas river, as the same is or shall be hereafter constructed, a distance, in the aggregate, of about one hundred and fifty-five miles, together with all lands and hereditaments acquired and appropriated for depots, superstructures, buildings, erections, and fixtures on the said line of railway, and all tracks, bridges, viaducts, culverts, fences, and all houses and buildings thereon or appertaining thereto, and all other property, real or personal, owned by said company on the first day of November, 1871, or thereafter to be acquired by said company for the construction, maintenance, and operating of said railway, with all and singular the rights, titles, privileges, hereditaments, & appurtenances to the same belonging or appertaining; to have and to hold the said premises and property, rights & privileges, above described, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behalf forever.

206 In witness whereof the said party of the first part, special master as aforesaid, has hereunto set his hand & seal the day and year first above written.

HERMAN MARKSON,
Special Master in Chancery.

Sealed and delivered in the presence of—
JOS. KELLOGG.

STATE OF KANSAS, *Leavenworth County,* } *ss:*

I, Z. E. Britters, a notary public in & for said county and State, do hereby certify that on the 23rd day of June, 1875, personally appeared before me Herman Markson, special master above mentioned & described & to me known to be the same person described in and who executed the foregoing conveyance, and that he acknowledged the due execution thereof.

In witness whereof I have — set my hand and affixed my notarial seal the day and year last above written.

[L. S.] Z. E. BRITTEN,
Notary Public.

STATE OF KANSAS, *County of Bourbon:*

I, James M. Stanley, register of deeds in and for the aforesaid county and State, do hereby certify that the within and foregoing is a true and correct copy of a special master's deed now on record in Book W of Deeds, page 455, in my office.

In witness whereof I hereunto set my hand and affix my official seal on this 27 day of April, 1883.

[SEAL.] JAMES M. STANLEY,
Register of Deeds.

[Endorsed:] Decree of court. Herman Markson to M. S. Cartler.
17—193

207 "EXHIBIT No. 3."

Warranty deed. John J. Franklin & wife, Francis Tiernan & wife, & A. M. Ayers & wife to St. Louis, Fort Scott & Wichita Railroad Company. Recorded on this 13th day of January, A. D. 1881, at 9 o'clock a. m. James M. Stanley, register of deeds.

Know all men by these presents that we, John J. Franklin and Julia A. Franklin, his wife, of Philadelphia, Pennsylvania; Francis Tiernan and Laura A. Tiernan, his wife, of Fort Scott, Kansas; and Alexander M. Ayers and Mary J. Ayers, his wife, of Urbanna, Illinois, in consideration of the sum of three million six hundred thousand dollars to us duly paid by the Saint Louis, Fort Scott and Wichita Railroad Company, have sold, and by these presents do grant, bargain, and sell and convey, to the said Saint Louis, Fort Scott and Wichita Railroad Company all and singular that portion of the railway lying and being in the counties of Bourbon and Allen, in the State of Kansas, and formerly known as the Fort Scott, Humboldt and Western Railway Company, which said company has constructed as by law — is authorized to construct from Fort Scott to Humboldt and from Humboldt westward to the Arkansas river, as their interest therein may appear, together with all lands and hereditaments acquired and appropriated for depots, superstructions, buildings, erections, and fixtures on the said line of railway, and all tracks, bridges, viaducts, culverts, fences, and all houses and buildings thereon or appertaining thereto, and all other property, real and personal, owned and acquired by a decree of the United States circuit court, district of Kansas, held at the city of Topeka, in and for the
208 State of Kansas, November 24th, 1874, and by virtue of the deed of the special master in chancery (Herman Markson) appointed by the said court, which said deed is dated June 21st, A. D. 1875, and made in pursuance of a sale made under and by virtue of said decree of said court, wherein M. S. Carter was plaintiff and Henry L. Shepherd, L. W. Shepherd, Charles B. Gray, George A. Amos, D. B. Emmert, The Fort Scott, Humboldt and Western Railway Company, The Farmers' Loan and Trust Company of the City of New York, and John A. Davenport were defendants, it being the intention of the parties hereto that the parties of the first part are to and do by these presents sell and convey to the parties of the second part all the right, title, and interest in and to the property, rights, privileges, and franchises of said Fort Scott, Humboldt and Western Railway Company as conveyed and acquired by the said M. S. Carter under and by virtue of the said decree of court and the deed of the said "master in chancery made in pursuance of and approved by said court:"

To have and to hold the said premises and property, rights and privileges, above described unto the said party of the second part to its only proper use, benefit, and behalf forever.

In witness whereof the said parties of the first part have here-

unto set their hands and seals this twenty-fifth day of September, anno Domini eighteen hundred and eighty.

JOHN J. FRANKLIN. [L. S.]
JULIA A. FRANKLIN. [L. S.]
FRANCIS TIERNAN. [L. S.]
LAURA A. TIERNAN. [L. S.]
ALEXANDER M. AYERS. [L. S.]
MARY J. AYERS. [L. S.]

Witnesses present at signing:

BENJ. FRANKLIN.
JOS. S. RILEY.

209 STATE OF PENNSYLVANIA, } ss:
City & County of Philadelphia, }

On the first day of October, A. D. 1880, before me, the subscribed, one of the magistrates of the city of Philadelphia, personally appeared John J. Franklin and Julia A., his wife, who, in due form of law, acknowledged the above indenture to be their act and deed, and desired that the same might be recorded as such.

The said Julia A., being of full age, and by me examined separate and apart from her said husband, and the contents of the foregoing indenture being first made fully known to her, declared that she did *it* voluntarily and of her own free will and accord, seal, and as for her act and deed deliver the same without any coercion or compulsion of her said husband.

Witness my hand and official seal the day and year aforesaid.

[L. S.] JOS. S. RILEY,
Magistrate of Court No. 19.

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the court of common pleas of said county, do certify that Jos. S. Riley, Esquire, before whom the annexed acknowledgment was made, was at the time of so doing a magistrate duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments, &c., and to all whose acts as such full faith and credit are and ought to be given, as well as in courts of judicative as elsewhere, said court being a court of record, and that I am well acquainted with the handwriting of the said Jos. S. Riley, magistrate, and verily believe his signature thereto is genuine; and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 2nd day of Oct., in the year of our
210 Lord one thousand eight hundred and eighty.

[L. S.] WILLIAM B. MANN,
Prothonotary.

STATE OF ILLINOIS, } ss:
County of Champaign, }

On this 3rd day of November, 1880, before me, clerk of the county court in & for said county, personally appeared Mary J. Ayers (wife of Alexander M. Ayers), to me personally known as the same person who signed the within deed, & acknowledged that she signed the same as her voluntary act for the uses & purposes therein set forth.

In testimony whereof I have hereto set my hand & seal of office of county clerk the day & year above written.

[L. S.] J. S. McCULLOUGH,
County Clerk.

STATE OF KANSAS, } ss:
County of Bourbon, }

On this 16th day of November, A. D. 1880, before me, a notary public in and for said county, came Francis Tiernan & Laura A. Tiernan, his wife, and A. M. Ayers, to me personally known to be the identical persons described in and whose names are affixed to the above conveyance as grantors, and acknowledged the execution of the same to be their own voluntary act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[L. S.] J. D. HITT,
Notary Public.

STATE OF KANSAS, *County of Bourbon:*

I, James M. Stanley, register of deeds in and for the aforesaid county and State, do hereby certify that the within and foregoing is a true and correct copy of a warranty deed now on record in book 30 of deeds, page 199, in my office.

In witness whereof I hereunto set my hand and affix my official seal on this 27 day of April, 1883.

[SEAL.] JAMES M. STANLEY,
Register of Deeds.

211 [Endorsed:] Copy. Warranty deed. John J. Franklin *et al.* to St. Louis, Fort Scott & Wichita Railroad Company.

In the Circuit Court of the United States, District of Kansas.

FRANKLIN C. SMITH, Compl't,

vs.

THE FORT SCOTT, HUMBOLDT & WESTERN R. R. CO., and THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, Def'ts.

It is hereby stipulated by and between said complainant, The Board of County Commissioners of Bourbon County, Kansas, that the testimony of J. D. Hill, if sworn as a witness in this case, would be as hereinafter stated, and the same is admitted as his testimony herein the same as if given in the usual manner, subject, however,

to all usual objections as to the competency, materiality, and relevancy of the matters stated, to wit:

"My name is J. D. Hill; have lived at Fort Scott, Kansas, several years; am a lawyer by profession; have been general business manager and one of the attorneys of the St. Louis, Fort Scott & Wichita R. R. Co. ever since organization of the company, and also one of the directors. I had charge of the matter of obtaining right of way for said road through Bourbon Co., Kansas, and other counties west of it. Under the conveyances hereto attached our R. R. Co. became the owner of the old grade and other property of the Fort — & Allen County R. R. Co., afterwards called the Fort Scott, Humboldt & Western R. R. Co., through and in Bourbon and Allen counties, Kansas, as described in said deeds hereto attached and marked, respectively, "Exhibits 1, 2, and 3," and made a part hereof. I made a careful investigation of the amount of right of way upon which said old grade was located in Bourbon county — was conveyed to and obtained by the St. Louis
212 Fort Scott & Wichita R. R. Co. under the said deeds hereto attached, and found that to be about eight miles, extending and being at different points along the route of said old grade from Fort Scott to the western line of Bourbon county. Said eight miles of right of way had been obtained by deeds of gift and purchase, in 1871 and 1872, from the owners of the land through which said old grade ran; that was all the right *of* our R. R. Co. obtained in Bourbon Co., Kansas, under deeds hereto attached, and the balance of such right of way now owned and occupied by our company in said county we have been compelled to purchase and condemn under the statute. Our Co., the said St. Louis, Fort Scott & Wichita R. R. Co., built its track upon about eighteen miles of said old grade from Fort Scott west towards Iola, Kansas."

The said parties hereto waive the introduction in evidence of said right of way deeds to the Fort Scott & Allen Co. R. R. Co. above mentioned and make no point as to that.

It is further agreed that either party may put in evidence at the time of hearing of this case, and only —, records of said U. S. circuit court that may be competent, relevant, or material testimony.

Fort Scott, Kansas, April 30th, 1883.

J. D. McCLEVERTY,
Sol'r for Board of Co. Com's of Bourbon Co., Kansas.
G. C. LAMPHERE,
Sol'r for Compl't.

Endorsed: No. 3001. Franklin C. Smith *vs.* Ft. Scott, Humboldt & Western R. R. Co. — B'd of Co. Com'rs of Bourbon Co., K's. Stipulation. Filed May 16, 1883. A. S. Thomas, clerk.

213 STATE OF ILLINOIS, } ss:
Cook County }

In the United States Circuit Court for the District of Kansas.

F. C. SMITH

vs.

BOURBON COUNTY, KANSAS, AND THE BOARD OF COMMISSIONERS OF BOURBON CO., KANSAS.

The depositions of W. C. Whitney, of Humboldt, in the county of —— and State of Kansas, and of Henry A. Edwards, of Chicago, Illinois, witnesses of lawful age, produced, sworn, and examined upon their oaths, on the 30th day of May and the 4th day of June, A. D. 1883, at my office in Chicago, Illinois, room 30, 161 La Salle St., by me, Thomas B. Brougham, a notary public duly appointed and agreed upon between the parties complainant and defendant to take the depositions of the said W. C. Whitney and Henry A. Edwards in a certain suit now pending in the said court, wherein T. C. Smith is complainant and Bourbon county, Kansas, and the Board of Commissioners of Bourbon county, Kansas, are defendants, on behalf of the complainant, as well upon the oral interrogatories of the complainant as upon the oral cross-interrogatories of the defendant.

The said W. C. WHITNEY being first duly sworn by me as a witness in the said cause, before the commencement of his examination, to testify the truth, as well on — part of the complainant as the defendant, in relation to the matters in controversy between the said parties so far as he should be interrogated, testified as follows:

Examination of W. C. Whitney.

Interrogated by G. C. LANPHERE on the part of complainant; defendant was not represented:

214 Q. What is your name, age, occupation, and place of residence?

A. W. C. Whitney; 49; contractor; Humboldt, Kansas.

Q. State whether you was one of the members of the firm of Ray & Whitney in 1871; and, if yea, state the names of the members of the firm and their occupations at that time.

A. I was. The names were Charles E. Ray and W. C. Whitney; occupation, contractors. Principal office, Chicago, and residence in Chicago.

Q. State whether prior to the fall of 1871 you or your partner had ever resided in the State of Kansas.

A. No.

Q. State whether your firm of Ray & Whitney did work in the way of constructing the road-bed, bridges, culverts, &c., upon the Fort Scott and Allen Co. railroad between Fort Scott and Humboldt, Kansas.

A. We did.

Q. Under what or whose contract with the company—that is, the Fort Scott and Allen Co. Railroad Co.—did you do that work?

A. F. C. Smith, the complainant in this case.

Q. At the time that you commenced work on that road or immediately previous, state whether said company had an engineer; and, if not, state what was said and done at that time by you and the officers of said railroad company.

A. Previous to our commencing work they had no engineer. We insisted that they should appoint an engineer, and the company did appoint a man by the name of Williams, and my impression is that his full name was Augustus Williams. He was a resident of Fort Scott.

Q. State how long he continued to be the engineer of the company.

A. He continued to be the engineer of the company until after the first of June, 1872—that is, until some time after the completion of the road-bed.

215 Q. State under whose general supervision you did that work.

A. We did it under the general supervision of the company's engineer—that is, under the supervision of Williams, and immediately under J. T. Kingsbury, T. C. Smith's engineer.

Q. State whether you ever saw or were acquainted with the contents of the contract made by F. C. Smith with said railroad company, a copy of which is attached to the bill of complaint filed in this case.

A. Yes; I am acquainted with the contract and know its contents.

Q. State whether your firm completed that contract to the satisfaction and acceptance of the said Williams, the engineer of said company?

A. We did.

Q. State whether the said Williams, as such engineer, made any report to the said company with reference to the completion of said contract; and, if yea, state what that report was and about what time made.

A. He did make a report to the company, and reported that the road was completed according to the terms of the contract about the 3rd day of June, 1872.

Q. State whether you was present at a meeting of the board of directors of said company on the 3rd day of June, 1872.

A. I was.

Q. State whether at that meeting D. B. Emmert, vice-president of the said road, offered the preamble and resolution in substance as follows: "Whereas the chief engineer of this Co., together with the J. T. Kingsbury, chief engineer for F. C. Smith & Co., have this day submitted their reports declaring that the work of grading, bridging, &c., of the road has been completed, according to contract with F. C. Smith & Co., from Fort Scott to Humboldt; therefore, resolved that the said — be, and is hereby, accepted."

216 A. Yes; he did.

Q. State whether that preamble and resolution was adopted by the board.

A. My impression is that it was not.

Q. State, if you know, the reason why.

A. Because they apprehended trouble with Smith, as there — a prospect of litigation between us and Smith, and they did not want to become mixed up in it.

Q. State whether at that time any objection was made by any member of the board of directors or any of its officers that Smith's contract with the company was not completed in a satisfactory manner.

A. Not to my knowledge.

Q. State whether prior to entering upon that work or even with any contract with Smith to perform said work you had any conversation with the board of county commissioners of said Bourbon county or any member thereof, and, if so, whom, in reference to the bonds to be issued by Bourbon county in payment of their stock subscription to said road; and, if yea, state with whom and what was said on the subject and at what time and place.

A. I did have, in February, 1872. Previous to undertaking this contract I called on Thomas H. Chapman, chairman of the board of county commissioners, and told him that I was talking of taking a contract to complete the road-bed of the said railroad company. Prior to this time I had seen the bonds that had been lithographed for the purpose of paying the subscription of the county to this road, and that I wanted to know from him if, on the completion of this road, the commissioners would deliver those bonds. He informed me that as soon as the road-bed was completed they would be delivered. I had a similar conversation with B. R. Wood, another of the commissioners, in which he gave me the same assurance.

217 Q. State whether you would have undertaken that contract and performed that work without those assurances.

A. I would not.

Q. State whether you relied upon the faithful issuance of those bonds in entering on the contract.

A. I did.

Q. State whether you had a settlement with F. C. Smith or G. C. Lanphere, as his agent, in reference to your claims for the work done on said road; and, if yea, state when it was and what was the nature of said settlement.

A. I had such a settlement; by that settlement the order given by Smith to Amsden & Co., and by him assigned to us and accepted by the railroad company, was revoked, and I was to look to Smith for my pay.

W. C. WHITNEY.

The said HENRY A. EDWARDS, being first duly sworn by me as a witness in said cause, before the commencement of his examination, to testify the truth, as well on the part of the complainant as the defendant, in relation to the matters in controversy between the said parties so far as he should be interrogated, testified as follows:

Examination of Henry A. Edwards.

Interrogated by THOMAS BATES on the part of complainant; defendant was unrepresented:

Q. Please state your name, age, & residence.

A. Henry A. Edwards; age, 48 years; I am a resident of Chicago, Ill.

Q. What is your occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. I have been a civil engineer about twenty-five years.

Q. During what portion of that time, if any, have you been engaged as civil engineer on railroads?

218 A. Fifteen years at least.

Q. Upon what roads have you been so engaged?

A. In the United States on the Terra Haute & Alton; Atchison, Topeka and Santa Fé; Lawrence and Topeka, and I made the surveys of the Chicago Belt Line. I was five years engaged in civil engineering on railroads in the Island of Cuba and one year in Mexico.

Q. Are you familiar with the ordinary terms used by railroad men and railroad companies in doing railroad work and in letting contracts, and the accepted meaning of those terms?

A. Yes; I believe I am.

Q. What is the meaning of the words "to complete the construction of the road-bed ready for the iron," and what is the common construction of those words when found in a contract by railroad men?

A. That the road-bed is ready for the ties and iron.

Q. In your opinion would the road-bed of a railroad be complete and ready for the iron when the grading is done and the bridges & culverts constructed?

A. Yes, sir; it would.

Q. Do you know what that term as quoted above means when applied to railroads in Kansas?

A. Yes, sir.

Q. Please state what it does mean there.

A. I was engaged as civil engineer on railroads in Kansas from 1869 to 1872, inclusive, and knew of quite a number of railroad projects of this character, and in every instance, so far as my knowledge or observation went, the words "to complete the construction of the road-bed ready for the iron" simply meant to complete

219 the grade and build the bridges and culverts ready for the superstructure, which meant the ties and iron, and does not include the ties as a part of the road-bed.

In what business are you now engaged, Mr. Edwards?

A. Civil engineer in the public works department of the city of Chicago.

H. A. EDWARDS.

I, the above-named Thomas B. Brougham, of Chicago, Illinois, duly appointed and agreed upon between the parties to take the depositions of the said W. C. Whitney and Henry A. Edwards, the witnesses whose names are subscribed to the foregoing depositions, do certify that before the commencement of their examination as witnesses in the said suit between the said T. C. Smith, complainant, and Bourbon County, Kansas, and The Board of Commissioners of Bourbon Co., Kansas, defendants, the said W. C. Whitney and the said Henry A. Edwards were duly sworn by me to testify the truth in relation to the matters in controversy between the said parties so far as they, the said W. C. Whitney and the said Henry A. Edwards should be interrogated concerning the same; that the said depositions were taken at my office, in Chicago, Ill., on the 30th day of May and the 4th day of June, A. D. 1883; that after the said depositions were taken by me as aforesaid the interrogatories and cross-interrogatories and the answers thereto as written down were read over to the said W. C. Whitney and the said Henry A. Edwards, and that thereupon the said depositions were, respectively, signed and sworn to by the said W. C. Whitney and the said Henry A. Edwards, respectively, before me at the place last aforesaid.

[SEAL.]

THOMAS B. BROUGHAM,
Notary Public.

[Endorsed:] No. 3001. Opened, at the instance & request
220 of def'ts' att'y, June 15, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Filed June 15, 1883. In the circuit court of the United States, district of Kansas. F. C. Smith *vs.* Bourbon Co., Kansas, and The Board of Commissioners of Bourbon Co., Kansas. Depositions of W. C. Whitney and Henry A. Edwards.

221 *United States* Circuit Court of the United States for the District of the State of Kansas, *ss.* June term, A. D. 1883.

FRANKLIN C. SMITH, Complainant,
vs.
BOURBON COUNTY, STATE OF KANSAS, and THE BOARD OF COUNTY COMMISSIONERS in & for the County of Bourbon, State of Kansas, Defendants.

In the month of October, 1873, Messrs. Ray & Whitney had commenced a suit in Bourbon county, Kansas, against the said F. C. Smith for work done & materials furnished in constructing the roadbed of the Fort Scott & Allen County railroad, afterwards called the Fort Scott, Humboldt & Western railway, and at that time, as the attorney of said Smith, I visited Fort Scott to look after the suit. Soon after I arrived there negotiations were commenced to settle said suit, and the settlement was finally consummated by the said Smith agreeing to pay them one hundred thousand — Bourbon county bonds and twenty-five thousand — township bonds, and the said Ray & Whitney agreed to receive the same in full satisfaction of their said claim. I did not at the time know of any order having been

given by Smith to Ray & Whitney or Amsden & Co. or to any one else for bonds due him on his contract. If I had known of such order I should have insisted on its being given up to Smith.

G. C. LAMPHERE.

It is stipulated and agreed by & between J. D. McCleverty, solicitor for the above-named defendants, and W. H. Rossington, solicitor for said complainant, that the above statement of G. C. Lamphere may be — as testimony in the case the same as if taken in usual form upon oath.

W. H. ROSSINGTON,
Solicitor for F. C. Smith.
J. D. McCLEVERTY,
Sol. for Def't County.

Endorsed: No. 300. Stipulation. Filed June 15, 1883. A. S. Thomas, clerk.

222 *Journal J.*

FRANKLIN SMITH
vs.
FT. SCOTT, HUMBOLDT & WESTERN RAILROAD CO. } 3001.

THURSDAY, *June* 14, 1883.

Submitted on pleadings and proofs; briefs to be filed.

223 *Findings of Fact.*

U. S. Circuit Court, Dist. of Kan.

FRANKLIN C. SMITH *vs.* THE COM'RS OF BOURBON CO. *et al.*

1. On July 23, 1869, the Board of Commissioners of Bourbon County made an order submitting a proposition to the voters of said county for the subscription of stock & issuing bonds of said county in the sum of one hundred & fifty thousand dollars, to secure the construction of a railroad from Ft. Scott westwardly north of the Marmaton river in the general direction of Humboldt, Allen Co.

The following is a copy of said order:

2. There was no record of the notice of the election preserved or filed in the clerk's office, but, as a fact, the proofs show that the notice of said election was first given on the 28th day of July, 1869, by publication in the Ft. Scott Monitor, a weekly newspaper published at Ft. Scott, in said county, and for three succeeding weeks thereafter, the last publication being on the 18th day of August, and the election was held on the 24th day of August.

3. On August 27th the vote was duly canvassed by the board of commissioners and was ascertained to be in favor of the subscription and issuing bonds by a majority of over seven hundred.

4. In October, 1870, more than a year after the bonds were voted, the Ft. Scott & Allen Co. Railroad Company was organized under the general laws of the State of Kansas for the purpose of building

a railroad from Ft. Scott westwardly on the north of the Marmaton river in the general direction named in the order under which the election was held.

The corporators and directors of this railroad were com-
224 posed largely of citizens of Bourbon county.

5. Soon after the organization of said railroad company the commissioners of said county appointed Joseph S. Emmert agent for the county to subscribe for and in the name of the county $150,000 stock in said company under the authority of the election held August 24, 1869, with the proviso that the company complete its road-bed ready for the iron from Ft. Scott to the western line of the county by the first day of July, 1872.

6. The agent aforesaid subscribed to the capital stock of the company in the amount above stated in the name of the county, as authorized by said order of appointment, and the said fifteen hundred shares of the county were at various meetings of the stockholders of the company represented and voted either by the chairman of the county board or by some other person.

7. On June 6, 1871, Franklin C. Smith, this complainant, made a contract with said railroad Co. to grade the road-bed from Ft. Scott to Humboldt, about 23 miles, and to construct all necessary bridges, culverts, &c., and he was to be paid in part therefor by $125,000 of these bonds of Bourbon county. Before making the contract he had assurances from two of the county commissioners that the bonds had been legally and regularly voted and that they would be issued on completion of the contract.

8. On July 28, 1871, on application of the railroad company, the board of county commissioners ordered the bonds to be prepared and signed by the chairman and deposited in the safe of the treasurer's office to await further order, which was accordingly done.

9. The road-bed was completed ready for the iron in substantial compliance with the terms of the subscription by the time named, to wit, July 1st, 1872.

It is proper to state here that on this point the evidence is
225 somewhat conflicting, but the engineers in charge of the work reported it so performed, and the county commissioners made no specific objection to any part of the work.

10. In June, 1872, after the work was performed the railroad company demanded the bonds of the county board, which demand was not granted; and, again, in August following, another demand was made by the railroad company, which was refused, and the commissioners then ordered the bonds destroyed, which was accordingly done.

11. It does not appear that the county commissioners made any objection that the resources of the company, together with these bonds, were not sufficient to construct the road-bed, and that its resources were sufficient for that purpose was demonstrated by the irresistible logic of an accomplished event.

The county subscribed to its capital stock, attended its meetings, took part in its proceedings without objection as to its resources, and never placed their refusal to issue the bonds on that ground, and so

I find they were satisfied on that point, and are estopped to deny it.

12. The name of the railroad company after its organization and about ——, —, was changed to the Fort Scott, Humboldt & Western Railroad Co. The company never filed any profile or map of its route in the clerk's office of said county, nor did the company secure and pay for the right of way along its line, with the exception of about eight miles.

13. By reason of the failure to obtain these bonds the company were unable to pay the complainant, and were largely indebted to him, and at the November term, 1879, he obtained a judgment in this court against the company for the sum of $267,113. The
226 company were and are insolvent, and execution was issued on said judgment and returned wholly unsatisfied.

14. This suit was commenced within a year after the termination of the former suit against the commissioners of said county and the railroad company.

Conclusions of Law.

1. The bonds never having been issued and the complainant having no greater rights than the said road company itself, I hold, on the authority of Lewis *v.* Com'rs, 12 Kan., 202; Ruby *v.* Shoin, 54 Mo., 207, and other cases cited, that the order of submission under which the election was had was illegal and void for the reason that no railroad company was named in the order nor was the company at that time in existence.

2. The notice of said election was insufficient and illegal, because it was not given thirty days before the election.

3. I find nothing in the proceedings of the board of commissioners that would estop them making these defenses, inasmuch as no official record was made or action had to such effect, although their course subsequent to the election may be characterized as unfair toward complainant and hardly in good faith.

4. The complainant's action is not bound by the statute of limitation.

5. The complainant's bill must be dismissed.

I concur.

GEO. W. McCRARY,
Circuit Judge.

[Endorsed:] F. C. Smith *vs.* Ft. S., H. & W. R. R. Co. *et al.* Findings of fact & conclusions of law.

227 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, 1883, proceedings were had and appear of record in words and figures following, to wit:

TUESDAY, *Nov.* 27, 1883.

FRANK C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT & WESTERN RAILROAD COMPANY and The Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas. } 3001.

Now, at this day, this cause came on to be heard at this term, the issues being closed, the complainant appearing by Messrs. Rossington, Johnston & Smith and Williams & Dillon and G. C. Lamphere, his counsel, and the defendant, The Board of County Commissioners of Bourbon County, Kansas, by their solicitor, J. D. McCleverty; and said cause was argued by counsel, and the court, having considered thereof and of the proofs and evidence, doth find upon the issues joined herein in favor of the said defendant, The Board of County Commissioners of Bourbon County, Kansas, and they are entitled to a decree accordingly.

Upon consideration thereof it is ordered, adjudged, and decreed that the complainant's bill be, and it is hereby, dismissed out of this court, and said complainant will pay to said defendants their costs to be taxed herein by the clerk of this court, and thereupon said complainant prayed for an appeal to the Supreme Court of the United States, which said prayer the court allowed.

C. G. FOSTER, *Judge.*

228 In the Circuit Court of the United States for the District of Kansas.

FRANKLIN C. SMITH, Complainant,
vs.
THE FORT SCOTT, HUMBOLDT AND WESTERN RAILROAD Company and The Board of County Commissioners of the County of Bourbon, Kansas, Defendants. } No. 3001.

Know all men by these presents that we, Franklin G. Smith, John C. Stewart, security, are held and firmly bound unto the above-named defendants in the sum of five hundred dollars, to be paid to said defendants; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated July thirtieth, 1884.

Whereas the above-named complainant hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit in said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named complainant shall prosecute his appeal to effect and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANKLIN C. SMITH. [SEAL.]
JOHN C. STEWART. [SEAL.]

UNITED STATES, }
Northern District of Illinois, } *ss:*

I, George C. Lamphere, a United States commissioner in and for the said northern district of Illinois, do certify that I am personally acquainted with the above-named John C. Stewart and have been for about thirty years, and that I have every reason to believe that he is worth more than ten thousand dollars over and above
229 all debts, liabilities, and exemptions.

Witness my hand and seal of office this 30th day of July, 1884.

[SEAL.] GEORGE C. LAMPHERE,
United States Commissioner.

UNITED STATES, *Northern Dis. of Ills.:*

John C. Stewart, being duly sworn, deposes and says that he resides in Galesburg, Ills. He further declares that he has property in value to exceed ten thousand dollars over and above all debts, liabilities, and exemptions.

JOHN C. STEWART.

Sworn and subscribed to before me this 30th day of July, 1884.

[SEAL.] G. C. LAMPHERE,
U. S. Com.

Filed Aug. 4, 1884.

A. S. THOMAS, *Clerk.*

No. 3001. Approved Aug. 4, 1884.

C. G. FOSTER, *Judge.*

Assignment of Errors.

And now come Rossington, Johnston and Smith and G. C. Lamphere, solicitors for the said Franklin C. Smith, and assign the following errors upon the foregoing record:

1. The court erred in holding that the order of submission, under which the election was had, was illegal and void for the reason that no railroad company was mentioned in the order.
2. The court erred in holding that the said order and submission was illegal and void for the reason that the company was not in existence at the time of the making of said order.
3. The court erred in holding that the notice of said election was insufficient and illegal.
4. The court erred in holding that there was nothing in the proceedings of the board of commisssoners that would estop them from making these defences.
5. The court erred in not finding for the complainant.
6. The court erred in finding for the defendants.
7. The court erred in dismissing the bill.

ROSSINGTON, JOHNSTON AND SMITH,
G. C. LAMPHERE,
Solicitors for Franklin C. Smith.

230 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and papers of said court of all the proceedings had therein in the suit of Franklin C. Smith, complainant, *vs.* Fort Scott, Humboldt and Western Railroad Company and The Board of County Commissioners of the County of Bourbon, Kansas, and Bourbon County, Kansas, No. 3001, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 26th day of August, A. D. 1884.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

A. S. THOMAS, *Clerk.*

Endorsed on cover: Kansas C. C. U. S. No. 193. Franklin C. Smith, appellant, *vs.* The Board of County Commissioners of Bourbon County, Kansas, and Bourbon County, Kansas. Filed 13th December, 1884.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 193.

FRANKLIN C. SMITH, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, AND BOURBON COUNTY, KANSAS, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT FOR APPELLANT.

A. L. WILLIAMS, ROSSINGTON & SMITH, Solicitors.

H. E. LONG, of Counsel.

SUPREME COURT OF THE UNITED STATES.

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THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, AND BOURBON COUNTY, KANSAS, APPELLEE.

BRIEF AND ARGUMENT FOR APPELLANT.

A. L. WILLIAMS, ROSSINGTON & SMITH, Solicitors.

H. E. LONG, of Counsel.

On the 23d of July, 1869, the commissioners of Bourbon county passed a resolution calling for an election on the 24th of August following, under the statute of Kansas, to decide the question whether the county should subscribe $150,000 to the capital stock of any railroad company then or thereafter organized to construct a railroad from Fort Scott, the county seat of Bourbon county, westerly on the north line of Marmaton river and to the city of Humboldt, in Allen county, Kansas. The election was accordingly held at the time appointed and the result was declared by the Board of County Commissioners in favor of the subscription. On the 13th of October, 1870, the Fort Scott & Allen County Railroad Company was duly organized. On the 6th of June, 1871, the appellant and

one Dunn, under the name of Smith & Company contracted with the said corporation, the Fort Scott and Allen County Railroad Company afterwards consolidated with another company, and called the Fort Scott, Humboldt & Western Rail road Company, to grade the line of its railway extending from Fort Scott, in Kansas, to Humbolt City, in the same State, and to build all the necessary bridges and culverts and to complete the work by the first of July, 1872, the railroad company in consideration of the work to be done, agreed to pay and deliver to Smith & Company certain municipal bonds amounting, according to their face value of $275,000, to-wit.—$125,000 in the bonds of Bourbon county, $25,000 in the bonds of Humbolt City, $75,000 in the bonds of Humbolt township, $25,000 in the bonds of Salem township, and $25,000 in the bonds of Elsmore township. Dunn assigned his interest in the contract to Smith. Smith did all the work before the time specified, to-wit, July 1st, 1872. On the 6th of June, 1872, the railroad company passed a resolution accepting the work, and acknowledging the fulfillment of the contract, the bonds of Humbolt township and Humbolt City, amounting altogether to $100,000 have been delivered to Smith pursuant to the contract; the bonds of Bourbon county and those of Salem township and of Elsmore township have not been delivered. On the 13th of October, 1871, the Commissioners of Bourbon county passed a resolution authorizing Joseph E. Emert to subscribe for $150,000 of the stock. He accordingly made the subscription and the county from time voted upon the stock in the meetings of the directors of the railroad company, the Commissioners resolved to prepare and in part to execute the bonds as soon as the necessary lithographing could be finished, and they were signed by the chairman and placed in the vault of the treasurer's office to be finally completed and delivered when Smith had completed the work. They promised Smith promptly to deliver them upon the completion of the work within the contract time. They were present when the contract was entered into and made the same promise to Smith & Company. But for their repeated assurance to this effect and the reliance of both Smith and Dunn, upon their good faith the work would not have proceeded and would not have been done. The county bonds have not been issued, the county imposing new and burdensome terms as a condition to be performed by Smith or the railroad company before they should be delivered. The railroad company is absolutely insolvent. In December 1879, Smith brought suit against the Fort Scott, Humbolt & Western Rail-

road Company, and obtained a judgement against it for $267,-113.19, and $14.55 costs of suit. This judgment is still of record, wholly unsatisfied and has never been reversed. The prayer of the bill is that the defendants be compelled and commanded to issue the bonds as provided for by Bourbon county and the county commissioners thereof, and that they be delivered to the appellant, Franklin C. Smith, as provided by the terms of his contract with the railroad company. There was no record of the notice of the election preserved or filed in the clerk's office, but as a fact the proof shows that a notice of election was given, and on August 27th, 1869, the vote was duly canvassed by the Board of Commissioners, and was ascertained to be in favor of the subscription and issuing the bonds by a majority of over seven hundred votes. The incorporators and directors of the railroad company, were largely composed of citizens of Bourbon county. The roadway was completed, ready for the iron, in substantial compliance with the terms of subscription prior to July 1st, 1872. In June, 1872, after the work was performed, the railroad company demanded the bonds of the County Board and the demand was not granted, and again in August following another demand was made by the company which was refused, and the commissioners then ordered the bonds destroyed, which was accordingly done. The County Commissioners made no objections that the resources of the company, together with these bonds were not sufficient to construct the road-bed, and that its resources were sufficient for that purpose was demonstrated by the irresistable logic of an accomplished event. The county subscribed to its capital stock, attended the meetings, took part in the proceedings without objections as to its resources, and never placed their refusal to issue the bonds on that ground. By reason of the failure to obtain the bonds the company were unable to pay the complainant, and thereupon he obtained the judgment herein before stated, and execution was issued on that judgment and returned wholly unsatisfied. This suit was commenced within a year after the termination of the former suit of this appellant against the commissioners of the county and against the railroad company heretofore determined in this court. Before making the contract with the railroad company, Smith had the assurance from two of the commissioners that the bonds had been legally and regularly voted, and that they would be issued on the completion of the contract. These are substantially the facts as shown by the record of this case.

ARGUMENT.

The first question presented is, where the bonds had not been issued and delivered, although the election had been determined in favor of the subscription by the County Commissioners, whether the county can now plead and show that the notice of said election was not given the required time provided by the statute.

This election was had under the laws of 1868 and 1869 statutes of Kansas, and under Chapter 24, Section 1, of the laws of 1866. We maintain, as the County Commissioners sitting under the laws of Kansas, as they did, for the purpose of passing upon whether or not an election had been had, and having determined that an election had carried in favor of the subscription, that their decision is final and conclusive. It has been determined in the case of the State on relation of Henry Keeler vs. Allen, in Fifth Kansas, 213, that it is within the scope of the authority of the Board of County Commissioners to determine whether an election has been had authorizing them to subscribe stock in a railroad company, and it is also within the scope of their authority to subscribe such stock when such election has been had; and to make all the necessary orders with reference to the same. This holding appears upon page 221 of that report.

Again, in the case of Board of Commissioners of the county of Knox vs. William H. Aspinwall, and others, in 21st How., 539, Mr. Justice Nelson delivering the opinion of this Court, says: "The Court must therefore look into the statute "for the purpose of determining this question, and upon look- "ing into it we see that full power is conferred upon the Board "to subscribe for the stock and issue the bonds where a majority "of the voters of the county have determined in favor of the "subscription, after notice of the time and place of election. "This case assumes that the requisite notices were not given of "the election, and hence that the vote has not been in conform- "ity with the law. This, however, would seem to be decisive "against the authority on the part of the Board to issue the "bonds, were it not for a question that underlies it; and that "is, who is to determine whether or not the election has been "properly held, and the majority of the votes of the county "cast in favor of this subscription? Is it to be determined by "the Court in this collateral way, in every suit upon the "bond or coupon attached, or by the Board of Commissioners "as a duty imposed upon it before making the subscription? "The Court is of opinion that the question belonged to the

"Board. The act makes it the duty of the Sheriff to give the "notice of the election for the day mentioned, and then de- "clares if the majority of the votes given shall be in favor of "the subscription, the County Board shall subscribe the stock. "The right of the Board to act in the execution of the authori- "ty is placed upon the fact that the majority of the votes had "been cast in favor of the subscription, and to have acted "without first ascertaining would have been a clear violation "of its duty, and the ascertainment of the vote was necessarily "left to the inquiry and judgment of the Board itself, as no "other tribunal was provided for the purpose. This Board was "one, from its organization and general duties, fit and com- "petent to be the depository of the trust thus confided to it. "The persons composing it were elected by the county, and it "was already invested with the highest functions concerning "the place and fiscal interests."

In the case of Bissell and others vs. the City of Jefferson- ville, 24 How., 287, on page 299, Justice Clifford, in deliver- ing the opinion, says: "Adopting the language of this Court "in the case of the Commissioners of Knox County against "Aspinwall and others, 21 How.. 544, we are of the opinion "that this Board was one from its organization and general "duties fit and competent to be the depository of the trust con- "fided to it.". In the case of Hadley vs. the Mayor and others of the city of Albany, 33 N. Y. 603, the Court of Appeals of that State held that the Council having once legally canvassed the votes returned for the election of Mayor of said city and having exhausted their powers over that subject, they could not afterwards reverse their decision by making a different de- termination, and that where the law has committed to officers the duty of canvassing the returns and determining the result of the election from them, and the officers have performed that duty and made their determination, the question as to the effect of the returns made is not open for determination in an action in which the title of the officer comes up collaterally. And in 12th Barbour, 217, the case of the people vs. Supervis- ors of Green, the Supreme Court of New York held that after a Board of County Canvassers had met and organized ac- cording to law, and proceeded to estimate the votes of the county and had recorded such estimate and determined who had been elected, and the Board had dissolved, that the deter- mination could not be attacked collaterally. And again in Bell vs. Pike, 53, N. H., 473, the Supreme Court of that State held that the court has no power to go behind the record and in-

quire whether or not a vote had carried, nor to order the clerk to make a record of any fact other than such as he was required to enter upon the record, to-wit, the determination of the Board of Canvassers as to whether the vote had carried or not.

Again in Texas, in the case of Arbury vs. Beams and others, 6, Texas, 457, where a statute required the chief justice of a certain county to order an election for the seat of justice and prescribed that the election should be held and the returns made in accordance with the laws of the State regulating elections, it was held that the statute conferred upon the chief justice a personal trust distinct from his ordinary official duties, that in receiving and estimating the returns he performed a judicial act and that a mandamus would not lie to compel him to receive and estimate the returns which he had rejected.

Again in Oglesby vs. Sigman and others, 58, Miss., 503, the Supreme Court held that where the commissioners by election had canvassed the returns of the election, made and declared the result, and had transmitted to the Secretary of State a statement of the whole number of votes canvassed in their county for each candidate voted for, their connection with the returns had terminated, and they could not be compelled by mandamus to re-assemble and re-canvas such returns.

In People vs. the Board of Supervisors of the County of Schenectady, 35, Barbour 408, the Supreme Court of New York say: "Inferior jurisdictions, such as Boards of Supervis-"ors, which derive their powers from the statute have not the "authority to re consider, to review, reverse, and annul their "own judicial action when it has once been exercised. When a "Board of Supervisors have by a legal quorum of their mem-"bers voted upon a resolution concerning the raising of money "under the statute authority to apportion the tax to be raised "among the several towns and wards of the county, and such "votes have been entered by their clerk in the book of records "required to be kept by them, they have exhausted their discre-"tion over that subject. They have executed a judicial act which "is in effect a judgment final and conclusive as to any power "they can exercise over it by way of review or reversal and a "subsequent apportionment or a resolution passed to that effect "to reconsider their former action would be held a nullity, and "they might be compelled by mandamus to attach collector's "warrants to the tax books made out according to the original "resolution and after the judicial power has been exercised, a "mandamus is the process to compel the performance of the

"ministerial functions, it being held that they exercised both "judicial and ministerial functions."

In the case of Shelby County Court vs. the Cumberland & Ohio Railway Company Bush (Ky.) 209, it was held, the correctness of the judgment of the County Court that the conditions of the propositions voted for had been complied with so far as to authorize the subscription of the stock in the railroad, cannot be questioned in a proceeding in the same court to compel the County Court by mandamus to issue the bonds of the county.

In Commissioners of Douglas county vs. Bowles, 94 U. S., 104, this court held the Board of Commissioners of a county is authorized to determine whether the condition precedent to the issue of bonds had been complied with.

II.

It is claimed by appellee, respondent, that it was necessary that the notice and call for the election should name some railroad to which the bonds were to go, and in which the subscription of stock should be taken by the county.

On this question this Court, in the case of Commissioners of Johnson County vs Thayer, 94 U. S., 631, Justice Hunt delivering the opinion of the Court, overruled the case of Lewis vs. the Commissioners of Bourbon County, 12 Kansas, 186, or in other words, held that it could not be applied in the Federal Courts, and held that under the acts of the Legislature of Kansas, authorizing the Board of County Commissioners of any county to, into, through, from, or near which any railroad is or may be located, to subscribe to the capital stock of the company. The location of the road is not a condition precedent to submitting the question of subscription to a vote of the qualified electors of the county, and that it was not necessary to insert the name of the company constructing the road.

In the County of Cass vs. Johnson, 95 U. S., 360, this Court held: "It is not an objection to the validity of bonds "issued under that act, that the railroad company to the capital "stock of which the subscription was made by the County "Court on behalf of the township, was not incorporated, until "the day when the election took place."

The act under which the election was held being similar to the act of the State of Kansas under which the election in the case at bar was held. Also to the same effect is the County of Davies vs. Huidekoper, 98 U. S., page 98–102.

In the case of Block vs. Commissioners, 99 U. S., 686, this Court again held that it was not necessary to name any particular company in the submission to the popular vote, affirming Commissioners of Johnson County vs. Thayer, 94 U. S., 631. And in Block vs. Commissioners, this Court say that they have not overlooked the opinion in the case of Lewis vs. Commissioners, 12 Kansas, 186. The notice and submission of the election in the case at bar was under the same law and in substantially the same form as that in the case of Block vs. Commissioners, *supra*.

III.

ESTOPPEL.

We maintain in this case that every act required to be done, both on the part of the Board of County Commissioners and the County on one side, and the railroad and the complainant on the other side, have been fully completed and performed, excepting the mere execution and delivery of the bonds to the complainant by the county. The complainant went on and did the work upon the assurance that the bonds would be executed and delivered when the work was completed, and upon this assurance, with that also that the election had been carried in favor of the bonds and of the subscription, and also upon the representation to that effect by the County Commissioners, expended large sums of money in the completion of the work and the building of the road. Nothing was ever said by the County Commissioners, no objections ever made by them that the work was not completed in time, nor performed as provided in the contract with the company; they went on and acquiesced in every act of his, even voted through its members of the directory of the company in the meeting of the company's directory; subscribed the stock through the county's agent to the amount originally agreed to be subscribed and no objections were made until long after the road had been completed by complainant and the work accepted by the company, and that too not until long after the bonds had been actually signed and placed in the treasurer's office for delivery. Under such a state of facts we maintain that the county is now estopped from claiming that the vote was not legal and from making the other defenses set up against the prayer of the petitioner in this case. The record in this case shows that the complainant was ignorant of any irregularity in the vote or frauds of the County Commissioners and went on and expended

large sums of money and a large amount of labor in completing the road. He acted in good faith and in fact lost all the property he had in this transaction. In the case of the People ex rel. vs. Logan county, 63 Illinois 374, it was alleged in the answer of the county that the complainant had knowledge of the illegality and frauds in the election, the demurrer to that answer admitted such facts to exist, but the court say "If then "there was fraud averred and the company knew of it be- "fore contracting or incurring liability they have no right to "compel the county to issue the bonds. Had they contracted "or incurred liability in the honest belief that the election was "fair and free from fraud, or had the bonds been issued and in "the hands of innocent holders, then a different question would "be presented," and the court further finds in this case that the demurrer admits that the company had notice of the frauds and illegality in the election before they incurred liability.

In the case of the People vs. Cline, 63, Ill., 398, the court say, "It is, however, urged that notwithstanding these may have "been a failure to comply with this statute in calling and hold- "ing the election, still the township is estopped by the canvass "of the votes, the returns of the County Clerk and the sub- "scription made by the Supervisor. Although this might be "true, had the bonds been issued and in the hands of an inno- "cent holder, or had the subscription been made without any "notice of the fraud, and the company had incurred liability on "the faith that the bonds would be issued, but here the com- "pany had notice of the fraud and therefore cannot say they "are defrauded."

To the same effect is Bigelow on estoppel, page 464. In the case of Board of Supervisors of Logan county vs. the city of Lincoln, 81, Ill., 156, Chief Justice Scott in delivering the opinion of the court says, "Before the doctrine of estoppel can "be invoked there must be some positive acts by the municipal "officers which may have induced the action of the adverse "party, and where it would be unequitable to permit the corpo- "ration to stultify itself by retracting what its officers had "done." The language there used by the eminent judge governs the case at bar precisely. There were positive acts by the municipal authorities of Bourbon county which we have called your Honors' attention to hereinbefore which induced the action of Smith, the complainant herein, in expending his large sums of money and going on and completing the road and performing his part of the contract with the railroad company, and these positive acts having been performed by the munici-

pal officers and he having acted upon them it would now be inequitable to permit the corporation to deny the validity or right of the officers, or to retract what the officers had done.

To the same effect is City of Chicago vs. the C. & W. I. R. R. Co., 105 Ill., page 73.

Also 108 Ill., page 151, County of Cook vs. Harmes.

Also Meister vs. Bemey 34 Mich., 435.

Grisler vs. Powers 81, N. Y. 57.

In the case at bar Smith acted in good faith, promptly, and the record shows he was influenced by a belief in the truth of the matters not only represented to him by the two County Commissioners, but by the acts of the officers of the county in voting at the directors' meeting of the railroad company, and it further shows that he will be greatly prejudiced if the representations made by the county are allowed to be now disputed by the county, it being recollected that the railroad company had no other resources out of which he could receive his pay than the bonds to be delivered to the company and by it to him.

Andrews vs. the Etna Life Insurance Company, 85 N. Y., 334.

In Zabriski vs. R. R. Co., 23 How, 381, on page 400 and 401, Justice Campbell says, "A corporation quite as much as "an individual is held to a careful adherence to truth in their "dealings with mankind, and cannot by their representations or "silence involve others in onerous engagements and then defeat "the calculations and claims their own conduct had superin-"duced."

In Bissell vs. City of Jeffersonville, 24 How, 299, the court used this language. "Duly certified copies of the record "of the proceedings were exhibited to the plaintiffs at the time "they received bonds showing to a demonstration that further "examination upon the subject would have been useless, for "whether they looked to the bonds or recorded proceedings there "is nothing to indicate any irregularity or even to create a sus-"picion that the bonds had not been issued pursuant to the law-"ful authority, and we hold the company and their assignees "under the circumstances of this case had a right to assume that "they imported verity.

"The citation of authorities to this point is unnecessary, as "the whole subject has recently been examined by this court and "the rule clearly laid down that a corporation quite as much as "an individual is held to a careful adherence to truth in their "dealings with other parties and cannot by their representa-

"tions or silence involve others in their onerous engagements "and then defeat the calculations and claims their own conduct "has superinduced.

Zabrisky vs. the Cleveland &c. R. R. C'o., 23 How, 400.

In Myer vs. City of Muscatine, 1st Wal., 384, it was held that where all parties acted in good faith the city could not afterwards object to the irregularity of the preliminary proceedings, and set up that the vote was not taken in the form in which under the charter it ought to have been taken.

Again in Pendleton county vs. Aimee 13, Wal., 298, it was held "The county issuing bonds to the railroad company in "payment of stock in the road, which subscription the county "was authorized by legislative enactments to make and to pay "for by the issue of the bonds, only after certain things directed "had been performed, may be estopped against asserting that "the conditions attached to a grant of the power were not ful- "filled and an estoppel would take place where a county had re- "ceived the proper amount of stock for which the bonds were "issued and had held it for a long time and was actually enjoying "it at the time when pleading want of authority to subscribe." Would the exception that the bonds were not actually issued and delivered in the case at bar change the rule? Surely not.

The case of Anderson County Commissioners vs. Beal, 113 U. S. 227, and the case at bar are very similar, and we think the principles laid down in that case should, as to the complainant in this case, be held to apply as against the county in the case at bar.

Again in Block vs. Commissioners, 99 U. S., 686, this court held, "Where pursuant to the statute (the one in question in the case at bar) an election was held in a county in Kansas "upon the question of a subscription to the capital stock of any "railway company then or thereafter to be organized, which "should construct a railroad from any point in Mis- "souri to a point in the county, and the result "having been declared by the proper authorities, "to be in favor of the subscription and was entered on their "minutes, the bonds were in 1870 issued in payment of the "subscription, to the Missouri company which caused the "road to be built, that the subscription was binding and that "the county in an action on the bond in the hands of a purchaser "is estopped from asserting that in fact a majority of the quali- "fied electors did not vote in favor of the issue of the bonds.

See also Moran vs. the Com's of Miami Co., 2 Black 722.

County of Randolph vs. Post, 93, U. S. 502.

In conclusion it will be seen that we have presented but three questions in this case, although there are at least seven errors assigned, but they are virtually covered by the three and probably by two questions which wholly govern the case. We maintain that the order of the County Commissioners in passing upon and determining that the election had been held, cut off all questions as to the illegality or fraud in the vote; also as to the notice not being given the sufficient length of time (and right here it may be said that there was no proof that the notice was not published, as by the laws of Kansas provided for, 30 days. The law of Kansas provides that the notice may be published by being posted as well as being also printed in the newspaper.) There is no evidence in this case that the notice of election were not posted as required by the laws of Kansas the requisite length of time. The only evidence that was introduced which tended to show that proper notice had not been given was a notice that was published in the newspaper 28 days, but the election was not held until more than 30 days had expired, and even though the notice had not been published the requisite number of days, if the election was not held until more than 30 days had expired it seems to us that tee county cannot complain in this action. They have received the benefits of the road which was built by the complainant at a great outlay of time and expenses, and as to the question of notice it seems to us their mouth is closed.

And finally as to the question of estoppel we maintain that from all the record produced in this case that if there ever was a case where the question of estoppel was a complete bar to the defense as set up by the defendants, it is in the case at bar.

We respectfully ask a reversal of the decision of the lower court.

A. L. WILLIAMS,
ROSSINGTON & SMITH,
Solicitors for Appellant.
H. E. LONG, of Counsel.

4-103

17

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 193.

FRANKLIN C. SMITH, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, AND BOURBOUN COUNTY, KANSAS, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

ARGUMENT IN REPLY FOR APPELLANT.

H. E. LONG, Appellant's Solicitor.

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Appellee in the statement of the case in his brief, says the railroad was never built, &c. In this we do not concur, the evidence of Mr. Whitney, and Mr. Smith, the complainant, shows the road was built and completed as far as the complainant was held by his contract to do so. The proposition submitted to the people to vote upon says that the bonds shall be executed and issued to the company whenever

the bonds provided for, with the other resources, shall be sufficient to complete the construction of the road-bed ready for the iron from Ft. Scott to the west line of Bourbon County.

The only contingency then upon which the bonds were to be issued was fully complied with by complainant for the company. The evidence of Mr. Smith (page 47 Transcript) shows the road-bed was completed ready for the iron from Ft. Scott to the west line of Bourbon County by the 1st day of June, 1872, long before the time provided in his contract with the company. Mr. Whitney, one of the sub-contractors, also testifies that it was completed, (see pages 35 and 36, Transcript,) and that there is now some 23 or 24 miles used as a railroad.

Mr. Whitney says (Transcript page 134,) the work was completed, and at a meeting of the Board of Directors on June 3d, 1872, the road was accepted by a resolution duly passed by the Directors. From the record then before us in this cause it appears that the road-bed was completed in accordance with the terms of Smith's contract with the company as well as in accordance with the terms of the proposition submitted to the people for the vote. Not that a railroad should be completed and cars running thereon, but that the road-bed should be completed ready for the iron as a condition precedent to the issuance of the bonds by the County to aid the Company to complete the road. (See page 74 Transcript extract of Weekly Monitor.)

ARGUMENT IN REPLY.

We will now proceed to discuss the questions presented by the record in the cause and raised by counsel in his argument.

Counsel maintains that the notice of election published in the Weekly Monitor was insufficient, and therefore the vote was void. In answer to this we say that there might have been notice given in some other manner, so far as the record in this case shows, than by publication in the Monitor. Not only so, but we say that the County Commissioners, when they passed upon the question whether the bonds had been duly and legally voted to the railroad, had to first pass

upon the question whether proper and legal notice had been given before the holding of the election. The act of the Board of Commissioners in that respect was judicial and final and cannot be questioned in this proceeding. See *Shelby County Court vs. Cumberland & Ohio Railroad Company*, 8 *Bush* (*Ky.*), 209, which was an action for mandamus to compel the County Court to issue bonds direct to railroad company. Judge Hardin, in a very ably written opinion, in referring to this question says: "It is insisted for the appellant that the petition and "evidence on which the County Court adjudged that the "conditions of the propositions voted for had been complied "with, so far as to authorize the subscription of stock, did "not authorize that conclusion; but whether this be so or "not, it is deemed a sufficient answer to the objection that "the court acted judicially, and the correctness of its judg- "ment, which remains unreversed, cannot be collaterally "questioned in this proceeding."

To the same effect is the case of *The Evansville, etc., Railroad Company vs. The City of Evansville*, 15 *Ind.*, 395. Worden, J., delivering the opinion, says: "The ques- "tion arises whose duty was it to determine whether the "requisite number of the freeholders of the city had peti- "tioned for the subscription? We think it clear that that "duty pertained to the Common Council, no other tribunal "having been provided for that purpose.

"The case of *The Commissioners of Knox County vs.* "*Aspinwall, et al.*, lately decided in the Supreme Court of "the United States (21 Howard, 53) settles a principle that "is entirely applicable here. That case, to be sure, involved "the validity of bonds that had already been issued, but the "decision was not made to turn upon the fact that the bonds "had passed into the hands of third persons. The following "extract from the opinion in that case will sufficiently show "the point made, and the ground upon which it was decided:

" 'The act in pursuance of which the bonds were issued
" 'is a public statute of a State, and it is undoubtedly true
" 'that any person dealing in them is chargeable with a
" 'knowledge of it; and as this board was acting under dele-
" 'gated authority, he must show that the authority has been
" 'properly conferred. The court must therefore look

" 'into the statute for the purpose of determining this ques-
" 'tion; and upon looking into it, we see that full power is
" 'conferred upon the board to subscribe for the stock, issue
" 'the bonds, when a majority of the voters of the county
" 'have determined in favor of the subscription after due
" 'notice of the time and place of the election. The case
" 'assumes that the requisite notices were not given of the
" 'election, and hence that the vote has not been in con-
" 'formity with the law.

" 'This view would seem to be decisive against the
" 'authority on the part of the board to issue the bonds, were
" 'it not for a question that underlies it; and that question
" 'is, who is to determine whether or not the election has
" 'been properly held, and a majority of the votes of the
" 'county cast in favor of the subscription? Is it to be de-
" 'termined by the court, in this collateral way, in every suit
" upon the bond, or coupon attached, or by the Board of
" 'Commissioners, as a duty imposed upon it before making
" 'the subscription? The court is of opinion that the ques-
" 'tion belonged to the board. The act makes it the duty of
" 'the Sheriff to give the notices of the election for the day
" 'mentioned, and then declares, if a majority of the votes
" 'given shall be in favor of the subscription, the County
" 'Board shall subscribe the stock. The right of the Board
" 'to act in execution of the authority is placed upon the
" 'fact that a majority of the votes had been cast in favor of
" 'the subscription; and to have acted without ascertaining
" 'it would have been a clear violation of duty; and the as-
" 'certainment of the fact was necessarily left to the inquiry
" 'and judgment of the board itself, as no other tribunal was
" 'provided for the purpose.'

"We might rest the case here, on the authority of that "above cited; but the importance of the question, and the "amount involved induces some further examination."

Judge Worden then proceeds with a very lengthy discussion of this question, and cites the following authorities:

Brittain vs. Kinnard, 1 Brad. and Bing., 432.
Beth vs. Bagley, 12 Pick, 572.
Martin vs. Mott, 12 Wheat , 19.

Vanderhayden vs. Young, 11 Johns, 150.
Birdsall vs. Phillips, 17 Wend., 465.
Ex parte Watkins, 3 Peters 193.
People vs. City of Rochester, 21 Barb, 656.

The argument of Judge Worden is far better to any presentation of the question which we could make to this Court, and we therefore invite the especial attention of the Court to this 15 *Ind.* case.

Again this Court in the case of Town of *Coloma vs. Eaves*, 92 *U. S.*, 484, has held that where the Board endorsed upon the bonds that the conditions upon which they were issued had been complied with, was conclusive upon the municipality, and the recital of such fact was a decision of the fact by the appointed tribunal. In the case at bar the decision or judgment of the Board of Commissioners was spread upon the proper record of the county, (see Transcript pages 62, 64 and 65,) instead of upon bonds.

To same effect see case of *Humboldt Township vs. Long et al.*, 92 *U. S.*, 642, which we desire the Court to carefully consider; also *People vs. City of Rochester*, 21 *Barb.*, 656. Your Honors will see that under the peculiar circumstances of this case, Mr. Smith, the complainant and appellant, occupies the position of an innocent or third party, who purchases the bonds without knowledge after execution.

The case of *New Haven &c. R. R. Co. vs. Town of Chatham*, 42 *Conn.*, 465, also, we think, is in point, and fully sustains the position we maintain in this cause.

See also *Society for Savings vs. City of New London*, 29 *Conn.*, 174.

The authorities cited by counsel from Illinois were determined under a peculiar statute, one which made the validity of the vote to depend upon the fact that proper notice had first been given and that too for the required length of time, while the statute of Kansas, cited by counsel, Sec. 51, Chap. 23, General Laws, 1868, is different. The condition precedent to subscribing for the stock and issuing bonds under Sec. 51, *supra*,

is that a majority of the qualified voters shall first assent to such subscription and the terms and conditions prescribed at either a general or special election. The same statute then says that when such consent shall have been given to such subscription, "*it shall be the duty of the said County, City "or Town authorities, as the case may be, to make such "subscription.*" The Board of Commissioners recognizing this mandatory requirement of the law, determined the election had been duly and legally held and carried, thereupon subscribed for the required stocks, and through its proper representatives the county voted, at the meeting of the directory of the Railroad Company, (see transcript pages 31 and 32.) At one of the meetings, Mr. D. R. Cobb, representing the county, voted 1500 shares of stocks, and at the other, Mr. Gardner, Chairman of the Board of County Commissioners, voted the shares of the county.

Having so subscribed to the stock of the railroad company, the Board of Commissioners were, by Sec. 3, Chap. 29, Laws 1869 of Kansas, not directed but ordered to issue the bonds. Sec. 3 of said Chapter is as follows:

"That Section fifty-three of said Chapter twenty-three "be and the same is hereby amended so as to read as follows: "Sec. 53. Upon the making of such subscription, such "county, city or town, shall thereupon become, like other "subscribers to such stock, entitled to the privileges granted, "and subject to the same liabilities imposed by this act, or "by the charter of the company in which such stock is taken, "except as the same shall be varied and limited by the terms "and conditions, upon which the said subscription shall have "been authorized and made. And it shall be the duty of "the Board of County Commissioners, or City Council, or "Trustees of the town, making such subscriptions as afore- "said, to pay for the same and the stock thereby agreed to be "taken by such county, city or town, by issuing to the com- "pany entitled thereto, the bonds of such county, city or "town at par, payable at a time to be fixed, not exceeding "thirty years from the date thereof, bearing interest at the "rate of seven per cent. per annum, and with interest cou- "pons attached," &c.

The balance of the section provides for levying taxes to

pay the interest on said bonds and to create a sinking fund to redeem said bonds at maturity.

The above section, with the two quoted by appellee on pages 4 and 5 of his brief and argument, constitute the whole of the statute to be considered in this case.

Your Honors will from these three sections of statute see how convincing and conclusive our position is. Sec. 53 following 51, shows without a doubt that the Legislature of Kansas placed the matter of passing upon the question whether an election had been legally called and carried, to the Board of County Commissioners, and after the Board had adjudged the election carried, and it had subscribed for the county to the stock of the company, the statute by a mandatory section (53) says that it shall issue the bonds, not *may* do it, but *shall* do it.

The statute must all be construed together, and when so done there is but one conclusion to be arrived at and that is, the questions raised by appellee were concluded and passed upon by the County Commissioners, and their judgment is final until reversed or set aside by proper proceedings, and neither the County or Board can raise the questions collaterally in this action. The cases in 94 *U. S.*, 429, *and* 119 *U. S.*, 215, are not applicable. Because the townships in those two cases attempted to vote the aid before the act under which they attempted to obtain the vote became a law by proper publication. In such case the townships had no power to start with at all. There was no law for them to proceed to vote such aid at the time the vote was ordered and actually held. A very different case from the one at bar. We maintain that the rule in most states concerning the holding of special elections is that if there is no fraud, and no one is shown to have been prejudiced by the irregularity complained of, then the defect complained of can avail nothing. The question is, was an election had, and if so, which way did it go. If determined either way by the Commissioners that settles it.

Clifton vs. Cooke, 7 Ala., 114.
Piatt, Supervisor, etc. vs. The People, ex rel., 29 Ill., 54.

The record in this case shows that the people were duly

notified that an election was going to be held, but possibly the notice which was published in the *Monitor* was not published quite the full thirty days, however, that cannot affect the election. The election, it is shown, was duly ordered and held.

Dishon vs. Smith, County Judge, 10 Iowa, 212.
See also Warsop vs. City of Hastings, 22 Minn., 438.
Clark vs. City of Janesville, 10 Wis., 136.

II.

We come now to the question of estoppel. Counsel in his argument, pages 8 and 9, says: "It has been well stated "by this Court that to evoke the doctrine of estoppel" " 'There must be error on one part and fraud or fault on part " of the other." ' What this Court meant by "*error*" was, there must be an injury; that the party must be placed in a worse position by the fraud or fault of the opposite party, than he was before the loss complained of was incurred.

Mr. Smith has been for many years trying to get his money out of this transaction, and one, too, that he was induced by the records of Bourbon County and the representations of its Board of County Commissioners, to enter into with the Railroad Company. He went ahead and completed the road in accordance with the terms of the vote and his contract with the company. The county has held its stock subscribed; received all the benefits it ever could out of the railroad; and now has a railroad occupying the same road-bed built ready for the iron by Mr. Smith. Mr. Smith entered into the contract in good faith, and spent his whole fortune; broke up in the transaction, and all through the fault and fraud of Bourbon County. He says on page 46 Transcript, Int. 25 and answer: "I should not have made "the contract had it not have been for the assurance I re- "ceived from the County Commissioners and Directors, rep- "resenting or claiming to represent Bourbon County, that "the proposed bonds of Bourbon County were legally voted, "and the assurance that I received from the members of the "Board of County Commissioners that those bonds would be "delivered to me as I might need them during the progress "of the construction of the work."

The record of the Board of Commissioners, had Mr. Smith gone to that, would have shown him that the election had been regular, and adjudged by said Board to have been duly carried. It would have shown just what the Board represented to him.

Mr. Smith, by examination of the resources of the Railroad Company, found that its resources, with the bonds it was to obtain, were sufficient to more than complete the railroad and to run cars thereon; much less to only complete the roadbed ready for the iron.

The case of *New Haven, Middleton, etc., Railroad Co. vs. Town of Chatham*, 42 *Conn.*, 465, is a case almost identical with the case at bar in its facts, and the Supreme Court of that State held that the town, as a municipal corporation, and the inhabitants of the town, were estopped from claiming that the vote was not legally taken. That case was an action for *mandamus* to compel a guarantee in aid of a railroad.

On the question of estoppel we fully presented our views, except the above citation, in our opening argument, and as appellee has cited no authorities holding the contrary doctrine we leave that question.

III.

We have but one more thought to present before we close, and that is: Mr. Smith has been ever diligent in the prosecution of his claim in this behalf against the county. In 1875 he brought an action in this matter and it was brought upon appeal to this court and by this court passed upon, in 99 *U. S.*, 398, adversely to Mr. Smith. He then at once obtained his judgment against the Railroad Company in December, 1879, in accordance with the ruling in 99 *U. S.*, 398, and then immediately proceeded, in January, 1880, with the present action to again try to obtain his just and rightful property. It is intimated by counsel that the claim is stale. If so, it is only made so by the respondent continually fighting us at every turn in the proceedings to recover the property which in equity and good conscience belongs to Mr. Smith.

We are now in equity, and of the two parties before this Court, it seems to us that Mr. Smith, who upon the assurances of the appellees, was induced to spend his whole fortune for the benefit of appellee, Bourbon County, ought to be granted a mandate ordering the issuance of the bonds prayed for. His equities are much stronger than those of appellees, and of two innocent persons he who induced the other to enter into a contract should suffer, but in this case the county will not suffer, because it will only be paying a debt which it contracted way back in 1869, and which appellant has been ever since trying to collect.

We ask a reversal of the decree of the lower court.

Respectfully submitted,

H. E. LONG,

Appellant's Solicitor.

24-105

Office Supreme Court U. S.
FILED
FEB 20 1888
JAMES H. McKENNEY,
Clerk.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

October Term, 1887.

No. ~~130~~ 193

FRANKLIN C. SMITH, *Appellant.*

vs.

THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, AND BOURBON COUNTY, KANSAS, *Appellees.*

BRIEF AND ARGUMENT FOR APPELLEES.

E. M. HULETT,
Solicitor for Appellees.

JAMES A. MOULTON, PRINTER, FORT SCOTT, KANSAS.

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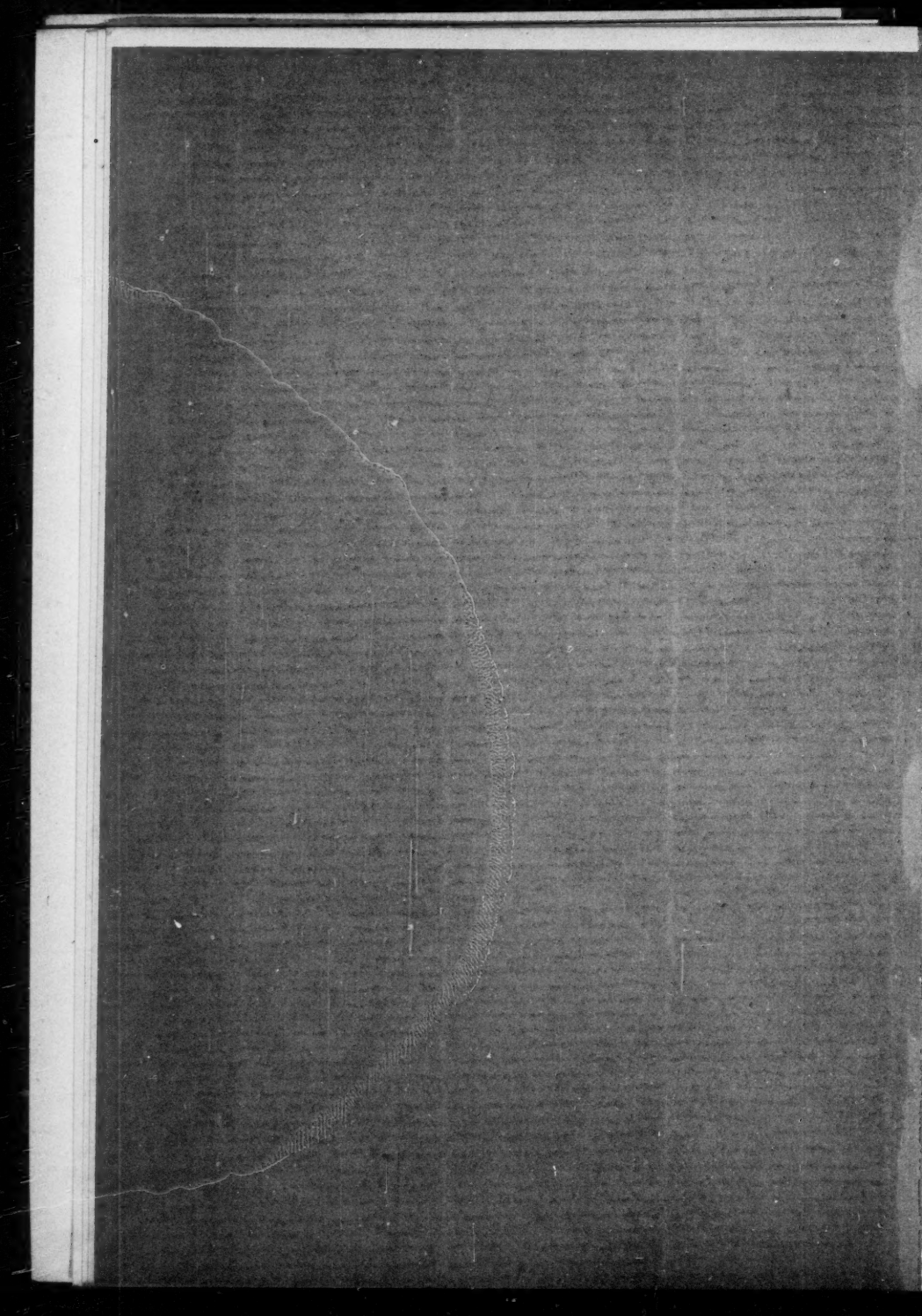

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STATEMENT.

On July 23d, 1869, the County Commissioners of Bourbon County, Kansas, by action of the Board, called an election to

be held August 24th, 1869, to determine whether the County of Bourbon, Kansas, should subscribe $150,000 to the capital stock of any railroad then or thereafter organized to construct a railroad from Fort Scott, Kansas, westerly on the north line of the Marmaton river to the city of Humboldt, Allen County, Kansas, and in case such election was decided affirmatively, such election should be held and be an affirmance of a canvass of a former election, held in 1867, and held to be a direction to subscribe at once $150,000 to the stock of the Tebo & Neosho Railroad Co., and issue the bonds of the county in payment therefor.

This action was taken and had under and by virtue of the provisions of Sec. 51, Chap. 23, of the General Laws of Kansas of 1868, as amended by Chap. 29 Session Laws, 1869.

An election was held pursuant to said order, on August 24th, 1869, upon a notice published in the "Fort Scott Monitor," beginning July 28th, and ending August 18th, 1869, and declared carried by the Board, acting as a Board of Canvassers, on August 27th, 1869.

On October 13th, 1870, the Fort Scott and Allen County Railroad Co. was organized.

On June 6th, 1871, this appellant contracted with said Company to grade and construct the road-bed of the Company from Fort Scott to Humboldt, in consideration of certain municipal bonds that the Company expected to acquire, among others $125,000 of the bonds of Bourbon County.

On October 13th, 1871, the County Commissioners authorized J. S. Emmert to subscribe for $150,000 of the stock of said Company on the conditions expressed in the proposition submitted to the voters August 24th, 1869.

The subscription was made, and the county voted upon the stock from time to time at stockholders meetings of the Company.

On June 6th, 1872, the Railroad Company accepted the road-

bed from appellant, and recognized the contract as fully performed on part of appellant, and demanded the bonds of the County Commissioners, which demand the County Commissioners refused. Again, in August, 1872, the Railroad Company demanded the bonds, and were again refused by the County Commissioners, on the grounds that the Railroad Company had not complied with the conditions of the subscription.

The Railroad Company was thereby unable to perform its contract with appellant.

Appellant sued the Railroad Company, after a long period of years, and by default obtained judgment for $267.113.19 and costs of suit.

The Railroad Company has been insolvent since 1872, and wholly unorganized, and no part of said judgment has been paid.

The railroad has never been built, either by itself or by a successor, nor by any other corporation or person.

This action was brought by the appellant in the Circuit Court for the District of Kansas, as a creditor of the Railroad Company, to compel the County of Bourbon to pay the value of the bonds voted by such election, held August 24th, 1869, and owing, by reason of the subscription made under the resolution of October 13th, 1871, to the Railroad Company.

The Circuit Court, on November 27th, 1883, entered its decree, that said bill be dismissed, and allowed an appeal to this Court.

ARGUMENT.

The only grounds upon which appellant seeks to recover against the County of Bourbon, is that it is indebted to the Fort Scott and Allen County Railroad Company, or its successor, the Fort Scott, Humboldt & Western Railroad Company.

I hold it as self evident that unless the Railroad Company might have successfully maintained an action against the

County of Bourbon to compel a compliance with its subscription to its capital stock, that this bill cannot be maintained, and the decree of the Circuit Court will be affirmed.

In August, 1869, at the time the election was called and held, there was no railroad company in existence which the County Commissioners were authorized or had the power to subscribe for its stock on behalf of the county.

Their authority was conferred by Sec. 51, Chap. 23, of General Laws of Kansas of 1868, as amended by Sec. 1, Chap. 29, Session Laws of 1869, which is as follows, to-wit:

"That Sec. 51, of Chap. 23, General Laws 1868, be and the same is hereby amended so as to read as follows:

"SEC. 51. The Board of County Commissioners of any county, the City Council of any city, or the Trustees of any incorporated town, may subscribe for and take stock for such county, city or town, in, or loan the credit thereof to, any railway company *duly organized* under this, or any other law of the State or Territory of Kansas, upon such condition or conditions as may be prescribed by the aforesaid county, city or town authorities. *Provided, however*, That a majority of the qualified voters of such county, city or town, voting upon the question of subscribing and taking such stock, shall at a regular or special election to be held therein, first assent to such subscription, and the terms and conditions prescribed as aforesaid, upon which the same shall be made, and, *Provided further*, That when such consent shall have been given to such subscription as aforesaid, it shall be the duty of the said county, city or town authorities, as the case may be, to make such subscription."

The Records of Bourbon County in evidence here (printed Record, page 111, Ex. "A,") show that the proposition submitted to the voters at the election held August 24th, 1869, was not to authorize the subscription of stock to the Fort Scott and Allen County Railroad Co., nor to any R. R. Co. in existence or organized. Therefore any subscription made in pursuance

of such election was void for lack of power on the part of the Commissioners.

12 Kans., 186–202, and cases there cited.

54 Mo., 207.

The evidence in this case shows that notice of the election held on August 24th, 1869, was not given the requisite time demanded by the Statute.

The 2d finding of fact by the Circuit Court (page 139 printed Record,) shows that but 27 days notice of the election was given.

The law prescribing the notice is Sec. 52, Chap. 23, General Laws 1868, as amended by Chap. 29 of the Session Laws of 1869, and is as follows:

"SEC. 52. A special election may be ordered by the County Commissioners of any county, the City Council of any city, or the corporate authorities of any town, at any time, for the purpose of ascertaining the sense of the voters of such county, city, or town, as contemplated in the preceding section. Notice of such election shall be given at least thirty days before the holding of the same, and the question or questions to be submitted thereat shall be set forth in such notice."

The Circuit Court finds as its 2d conclusion of law, (page 141 printed Record,) that "the notice was insufficient and illegal, because it was not given thirty days before the election."

If any notice is required to empower the Commissioners to make a subscription that will bind the county, then that notice designated by the Statute is the one required. Anything less is no notice, and can confer no power.

We submit that the following authorities fully sustain the principle that notice must be given as required by Statute, to empower municipal officers to contract for stock, and that county will not be estopped from pleading insufficient notice:

92 Ills., 441, see page 453 to 454.

62 Ills., 170.

Dillon on Municipal Cor., Sec. 197, 3d Ed.

39 Ind., 603 to 604.

Though subscription actually made, it does not effect the fact that notice was insufficient.

67 Ills., 57–65, People vs. Town Santa Anna.

87 Ills., 385, Law vs. People.

Nor can third parties acquire greater rights than the corporation.

51 Vt., 257, Laneville Valley R. R. Co. vs. Fairfield.

88 Ills., 202, People vs. Oldtown.

The appellant seeks to avail himself of the law or doctrine of estoppel, and cites Mr. Justice Nelson's opinion in the case of Commissioners of Knox County vs. Aspenwall, 21 How., 539, and on pages 4 and 5 of his printed brief and argument herein, cites an extract from the opinion. The next sentence in that opinion, and the same paragraph, reads as follows:

"We do not say that the decision of the Board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached. But after the authority has been executed, the stock subscribed and the bonds issued and in the hands of innocent parties, it would be too late even in a direct proceeding to call it in question, much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

While the courts have gone to the greatest lengths to uphold and protect the holders of bonds issued by municipal corporations in the hands of innocent parties for value, they have never gone to the extent asked for in this instance. That the assertion or statement of a member of a board of County Commissioners, in his individual capacity, augmented by the declaration of a number of private citizens of the county, that the bonds of the county had been fairly voted and would be issued in payment of a subscription made under said vote and election.

Should be held as an estoppel on the part of the county, and prevent an inquiry as to the power of the county to contract

for the stock of a railroad in an action by either the railroad company or one of its creditors.

The contract between the Railroad Company and appellant was to construct and grade a road-bed, with bridges and culverts, from Fort Scott to Humboldt, Kansas, a distance of about 43 miles. The subscription of the county was conditional, to be operative and binding upon the county when the Railroad had constructed its road-bed ready for the iron, or had resources sufficient to do so.

These are two very different contracts, and if the county had the power to make the contract which it attempted to make by its subscription, which is denied, then the completion by Smith of his contract with the Company, and the acceptance of the work by the Railroad Company, would be no evidence of the compliance with and fulfillment by the Company of the conditions of the subscription.

The only action taken by the county in reference to the subscription, was that taken on June 6th, 1872 August 22th, 1873, and September 28th, 1872,—see printed Record, pp. 65, 66, 68.

In each case the County Commissioners refused to issue the bonds, for the reason that the conditions of the vote and the subscription had not been complied with.

The Circuit Court seemed to act upon the theory that the completion by appellant of his contract with the Railroad Company would be and was a fulfillment on the part of the Company of the conditions of subscription of the county, and hence its 9th finding of fact, viz:

"The road-bed was completed ready for the iron, in substantial compliance with the terms of subscription, by the time named, to-wit: July 1st, 1872."

The engineer in charge of the work reported the contract of Smith completed, but I fail to find any evidence in the Record that the road-bed was ever completed ready for the iron, or to the extent of fulfilling the requirements of the conditional sub-

scription. Instead of "the irresistible logic of an accomplished event" showing such fact, the inexorable order of facts show it never was accomplished.

The Company never procured the right of way, save about eight miles, never secured a tie, nor had it the means to secure one. Was in fact bankrupt and utterly *in extremis* when the demand was made on the county for its bonds. The Board would have been guilty of wasting and throwing away the funds of the county had they complied with the demand.

We therefore submit that the 9th finding of fact of the Circuit Court is not supported by the evidence, and upon that ground the judgment of the Circuit Court was correct, and should be affirmed.

Again, we submit that the judgment of the Circuit Court is correct for the reason that there was no power conferred by the election of August 24th, 1869.

It was not such an election as the Statute authorized them to call. There is no authority in the Statute to submit two distinct propositions at the same election, to be determined by one ballot, and at which election a voter was unable to vote for the one without also voting at the same time for the other.

In the absence of any statutory authority whatever for such an election, it seems that a bare presentation of the proposition is sufficient.

The argument that the county is estopped from setting up the defense of lack of authority, by reason of its canvass of such a vote and its conditional subscription thereunder, and the uncertain declaration of a portion of the members of the Board, augmented by statements of citizens of the county, "that the bonds were fairly voted and would be issued in compliance with such vote," is certainly carrying the doctrine of estoppel to a greater length than ever before attempted.

It has been well stated by this Court that to evoke the doc-

trine of estoppel, "There must be error on one part and fraud or fault on part of the other."

The error in this case, if any, was on part of the appellant, in not looking at the Records, as he might, to ascertain the authority of the County Board, and in not examining the resources of the Railroad Company, with whom he contracted, as to its ability to comply and fulfill the conditions of the subscriptions.

The voluminous citation of cases by appellant, to establish and show an estoppel upon the county, are, without exception as far as I have examined, those cases in which bonds have been issued and passed into the hands of innocent parties, or taxes have been levied and interest paid, or some action taken by the municipality in its organized and official capacity, whereby the other party dealing with them was led to believe, and had a right to believe, that their acts were lawful and binding, and by reason whereof he was induced to accept their acts as authorized, and to doing which would subject him to loss.

The decision in 94 U. S., 631, Johnson Co. vs. Thayer, in no way subverts or destroys the authority of Lewis vs. Com'rs, 12 Kans., 186, upon the question involved in this action, a different Statute was there being construed, and on page 640, in opinion, Hunt, Justice, says: "Notice was given for the time required by the Statute."

The Statute under which the election of August 24th, 1869, was held, was that of 1868, as amended in 1869. It required a notice of thirty days to be given, and to be for aid to a railroad company duly organized. The case of Block vs. Com'rs, 99 U. S., 686, was also one in which the bonds were issued under a former law, the same as in Johnson Co. vs. Thayer, and in both cases the bonds were issued and in the hands of innocent *bona fide* parties for value. Neither case holds any principle inconsistent with the ruling of the Circuit Court in this action.

That the statutory notice is requisite to the validity of the

bonds issued, is directly held by this Court in McClure vs. Township of Oxford, 94 U. S., 429. Even when the bonds are issued, where the holders of the bonds knew of the lack of notice, or inadequence of notice, or were required to know.

If lack of proper notice is fatal to bonds issued, still more strongly will it apply in this case, where the bonds were definitely refused whenever demanded.

The cases of McClure vs. Township of Oxford, and Crow vs. Oxford, 119 U. S., 215, are decisive of this case if adhered to.

We assume that it requires no argument and no citation of authorities to demonstrate that courts will not make contracts for parties, nor relieve parties from the losses incident to inadvertant or improvident contracts that they may have entered into, either by reason of non investigation of the ability of the party to perform, or lack of power to contract.

The County of Bourbon was unauthorized to make the contract it did make with the Railroad Company, because no power was given it by the Legislature to submit the questions it did submit by the election of August 24th, 1869. Nor was the notice of 27 days given for such election sufficient to empower the Board of Commissioners to call any election under the laws of 1869 to submit a proposition of subscription to the capital stock of any railroad.

Had the Railroad Company brought suit to enforce the contract pretended to be made by virtue of such subscription, it would have failed, as the creditors of the Railroad must fail in this action.

The fact that appellant failed to secure the benefits of his contract is no reason why the tax payers of the county should be mulcted for a large sum of money, for which they get nothing, and will get nothing.

The judgment of the Circuit Court, we submit, is correct, and ask its affirmance.

E. M. HULETT,
Solicitor for Appellees.

127-113

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 213.

BENJAMIN LAWRENCE AND PHINEAS LAWRENCE, PLAINTIFFS' IN ERROR,

vs.

EDWIN A. MERRITT, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 11,. 1885

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 24, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Benjamin Lawrence and Phineas Lawrence, plaintiffs, and Edward A. Merritt, defendant, a manifest error hath happened to the great damage of the said plaintiffs as by record appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October, eighteen hundred and eighty-five, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-five.

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

HOYT H. WHEELER, *Judge.*

2 [Endorsed:] 7026. U. S. Supreme Court. Benjamin Lawrence *et al.*, plaintiffs in error, against Edward A. Merritt, defendant in error. Writ of error.

Due service of a copy of the within writ of error is hereby admitted this 27 day of January, 1885.

ELIHU ROOT,
Attorney for Deft. in Error.

[Stamped.] U. S. Circuit Court. Filed Jan. 27, 1885. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America, for the southern district of New York, in the
3 second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to thirty-three inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Benjamin Lawrence and Phineas Lawrence, plaintiffs in error, against Edward A. Merritt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this sixth day of March, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States, the one hundred and ninth.

[Seal of U. S. Circuit Court south. dist., New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 *Summons.*

Superior Court of the City of New York.

BENJAMIN LAWRENCE & PHINEAS LAWRENCE, Plaintiffs,
against
EDWIN A. MERRITT, Defendant.

To the above-named defendant, Edwin A. Merritt:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in the case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, May 25, 1881.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

Office and post-office address: Isaac Phillips, No. 59 Liberty St., New York City, New York.

5 Endorsed: Superior court, city of New York. Benjamin Lawrence & another against Edwin A. Merritt. Summons. Isaac Phillips, plaintiffs' attorney, 59 Liberty St., N. Y.

6 The President of the United States of America to the judges [SEAL.] of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Edwin A. Merritt, defendant, by Benjamin Lawrence & ano., plaintiffs, do therefore command you that the record and proceedings in said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 24th day of June, 1881, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 20th day of June, in the year one thousand eight hundred and eighty-one.

JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

7 [Endorsed:] 7026. U. S. circuit court. Benjamin Lawrence & ano. *vs.* Edwin A. Merritt. Copy certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, June 20th, 1881.

Yours, STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

To I. P., plaintiffs' attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, June 20th, 1881.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

8 *Complaint.*

Circuit Court of the United States for the Southern District of New York.

BENJAMIN LAWRENCE & PHINEAS LAWRENCE, Plaintiffs,
against
EDWIN A. MERRITT, Defendant. } N. S. 7026.

Plaintiffs complain:—

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade under the firm name of B. & P. Lawrence, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed and as served on defendant or his attorney.

3d. The defendant as such collector exacted from plaintiffs as and for duties thereon, viz.: at the rate of thirty-five per centum ad valorem.

4th. That by the laws of the United States the true duty upon said goods was at the rate of twenty per centum ad valorem; but plaintiffs, in order to obtain said goods, were compelled to pay the defendant, as such collector, the sum of three hundred and forty-six $\frac{80}{100}$ dollars, in gold coin of the United States, in excess of the amount required by law.

5th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto and also as above stated.

6th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

7th. That the bill of particulars hereto annexed and as served on defendant or his attorney, states for each importation separately the date of entry at the custom house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

8th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for three hundred and forty-six $\frac{80}{100}$ dollars, in United States gold coin, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with costs and disbursements of this action.

ISAAC PHILLIPS,
Attorney for Plaintiffs.

9 STATE OF NEW YORK, }
City and County of New York, } *ss:*

—— ——, of the plaintiffs, being duly sworn, says he has read the foregoing complaint; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

—— ——.

Signed and sworn to before me —— —, 188–.

—— ——.

[Endorsed:] N. S. 7026. United States circuit court. Benjamin Lawrence and another *against* Edwin A. Merritt. Complaint. Due service of a copy hereof is hereby acknowledge- this — day of ——, 188–. —— ——, att'y for def't. Isaac Phillips, pl'ffs' attorney, 59 Liberty street, New York city.

10 *Bill of Particulars.*

Suit commenced May 25, 1881.

Name of importers—Benjamin Lawrence and Phineas Lawrence, (composing the firm of B. & P. Lawrence.)

Description of merchandise—Printing paper unsized used for books exclusively.

Place whence imported—Hamburg.

Name of vessel—Cimbria.

Date of invoice—10th Aug, 1880.

Date of entry at custom-house—Sept. 4th, 1880.

Amount of excess claimed—$346.80.

Date of payment—16 Nov., 1880.

Date of filing protest—13th Nov., 1880.

Date of appeal to Sec'y of Treasury—13th Nov., 1880.

Date of decision on appeal—12th March, 1881.

11 Superior Court.

BENJAMIN LAWRENCE & Another,
against
EDWIN A. MERRITT.

NEW YORK, *June* 10, 1881.

SIR: Please take notice that the following, or within, is a bill of particulars of the plaintiff's demand in this action, which is brought to recover money erroneously and illegally exacted of and from the plaintiffs by the defendant, as collector of customs at the port of New York, and as for duties on merchandise imported in the vessels and at the dates specified in said bill of particulars, to which add legal interest on the amounts from the dates of payment as aforesaid.

Yours, &c., ISAAC PHILLIPS.
Plaintiffs' Attorney.

To Stewart L. Woodford, Esq., Defendant's Attorney.

[Endorsed:] N. S. 7026. Superior court. Benjamin Lawrence & another — Edwin A. Merritt. Bill of particulars. Isaac Phillips, attorney for plaintiffs.

Due service of copy of within bill of particulars and notice is hereby admitted.

New York, ——, 188–.

——— ———,
Attorney for Defendant.

12 United States Circuit Court, Southern District of New York.

BENJAMIN LAWRENCE *et al.*
versus
EDWIN A. MERRITT, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity, received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs at the times in said complaint mentioned were paid by said plaintiffs as a debt due by them to the United States, and not otherwise; and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter and before the commencement of this action, or the service of any protest, paid into the treasury of the United States; and that the amount of said moneys so received from plaintiffs were the amounts due from them to the United States, accord-

ing to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with the duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable according to the laws of the United States, at the rates specified in the complaint.

IV. And the defendant, further answering, admits that plaintiffs filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiffs, conformable to the laws of the United States, and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same, and each thereof, and leaves the plaintiffs to make such proof thereof as they may be advised.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

13 SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

W. H. Robertson, being duly sworn, says that he is the defendant above named, and that the foregoing answer is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

—— ——

Sworn to before me this — day of ——, 188–.

—— ——

Notary Public, New York County.

[Endorsed:] 7026. U. S. circuit court, southern district of New York. Benjamin Lawrence *et al. vs.* Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant.

Due service of a copy of the within answer is hereby admitted. New York, June 29, 1881.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

To I. P., plaintiff's attorney.

14 At a stated term of the circuit court of the United States

of America, for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Tuesday, the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Alfred C. Coxe, acting circuit judge.

BENJAMIN LAWRENCE, *et al.*,
vs.
EDWIN A. MERRITT, } 7026.

Now comes the plaintiffs, by Stanley, Clarke & Smith, their attorneys, and move the trial of this cause. Likewise comes the defendant by Samuel B. Clark, ass't U. S. attorney, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, the jury retire, and on their return, render a verdict whereby the — find for the defendant.

On motion of plaintiffs' counsel the court orders that
15 plaintiffs have a stay of proceedings on said verdict for thirty days.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

16 *Judgment.*

United States Circuit Court, Southern District of New York.

BENJAMIN LAWRENCE & ANO.,
vs.
EDWIN A. MERRITT, } 7026.

The issues in this action having been brought on for trial before Mr. Judge Coxe and a jury, at a circuit court of the October term, 1883, and the issues having been tried, and a verdict for the defendant having been duly rendered on the fifteenth day of December, 1883, and his costs having been adjusted at $48\frac{85}{100}$.

Now, on motion of Elihu Root, United States attorney for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48\frac{85}{100}$, his taxed costs, and have execution therefor.

Judgment signed this 20th day of May, 1884.

JOHN A. SHIELDS,
Deputy Clerk.

17 [Endorsed:] 7026. United States circuit court. Benjamin Lawrence & Ano., *vs.* Edwin A. Merritt. Judgment roll. Elihu Root, United States attorney, for defendant. Filed — 187–. Costs, $48\frac{85}{100}$. U. S. circuit court. Filed, May 20, 1884. Timothy Griffith, clerk.

18 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

BENJAMIN LAWRENCE *et al.*
vs.
EDWIN A. MERRITT, Collector.

The issues in this case came on for trial at the October term of this court at a session held by the Hon. Alfred C. Coxe, district judge, sitting as circuit judge, according to the statute in such case made and provided, at the court room in the city of New York, on the eighteenth day of December, 1883, the plaintiffs being represented by Messrs. Stanley, Clarke & Smith, and the defendant by the United States attorney and S. B. Clarke, Esq., his assistant.

And in the course of said trial divers exceptions were taken by the counsel for the plaintiff to the rulings of said court, which said several exceptions were then and there allowed by the court and more fully appear in this bill of exceptions.

To sustain the issues upon their part, the plaintiffs' counsel introduced testimony showing that the plaintiffs imported into New York, in September, 1880, forty cases of paper, entered by them as unsized book paper (dutiable at twenty per centum), but this entry was liquidated by the defendant at thirty-five per centum, as tissue

19 paper.

It is admitted that all formal proceedings of entry and of payment of the duty (as liquidated by the collector) under protest, etc., etc., were correct.

The amount claimed by the plaintiffs is $346.80, the difference between twenty and thirty-five per centum on the appraised value of the importation, with interest from the 16th day of November, 1880, when the duties were paid.

The plaintiffs called three witnesses who testified that the paper imported was "unsized book-paper; neither sized nor glued," imported to be made into books, for the purpose of transferring letters to the book by writing upon a sheet of paper and transferring the copy of your original to this book, thus preserving a record, *i. e.*, to be made into the letter-copying books in common use.

The familiar process of transfer, was thus described by one of the plaintiffs in his testimony: "You write a letter, and after writing the letter, you take a sheet of dampened paper and put it over one page, and then put the book in a press and after it has received pressure, there is a transfer from the original. It is identical with the original writing, exactly on the same principle as printing—it is a form of printing."

Upon cross-examination of this witness (Benj. Lawrence), it appeared that this paper in controversey was invoiced abroad as "tissue paper," though the witness said they called it "copying paper" in their order for it, and in reply to the next question of the assistant U. S. attorney as to the specific name by which it was known in trade said: "It is known by the trade as copying paper."

20 Replying to the next following question of the U. S. At-

torney, he said: It is a copying paper, as shown in this book, but not a tissue paper. A tissue paper is a paper that is used for wrapping up parcels, to prevent them scratching and to preserve them. It is a different character of paper from this, and the copying paper is of a better quality, and is not used for the same purposes."

By the other witnesses called by plaintiffs, it was shown that this kind of thin paper, was imported to be made up into letter-copy-books, and for that purpose exclusively.

Cross-examining one of them, the U. S. attorney elicited a statement of the obvious fact that in taking a copy of a letter upon this paper, the ink soaks through the paper, so the copy is read from the side opposite to that which is pressed against the original letter.

When the plaintiffs rested, the U. S. attorney moved to have a verdict for the defendant directed upon the ground that within the meaning of the statute, the paper is not used for printing, nor is the copying-book such a book as the statute intends. This motion was denied.

The government then called two witnesses who testified that the importations was "a tissue paper that is used for copying," not for making books and papers, and that it was not printing paper, the difference being as defined by the first witness for the defence, that "printing paper is a paper which will take an impression from types or plates, the impression is made on the surface, and is read from the surface and not through the paper.

21 Upon cross examination this witness said that "in that form (as imported) it is called a copying paper, but it really is tissue paper."

Upon the redirect-examination this witness testified—

(By ass't U. S. att'y.)

Q. I understand you to say that the printing paper used in trade and commerce does not mean any paper that may be printed on but has a restricted and technical meaning; that is so, is it not?

A. Yes, sir.

Q. In point of fact that (plaintiffs' importation) is not what is called printing paper in trade and commerce?

A. No, sir; tissue paper.

To the other witness called for the defendant the U. S. attorney put these questions, which were allowed against the plaintiffs' objection and exception, answered and exception taken.

Q. State whether or not the phrase printing paper means any paper that may be printed upon or whether it has any restricted, technical meaning in trade or commerce?

Plaintiffs' counsel objects, on the ground that it appears on the face of the statute that it is not used as a technical phrase at all. Objections overruled. Plaintiffs' counsel excepts.

Not answered.

Q. Has it a technical meaning?

The same objection, ruling and exception.

A. It has.

22 Q. What is the meaning of printing paper in trade and commerce?

The same objection, ruling, and exception.

A. Printing paper is paper that is ordinarily used for receiving impressions from type and plates.

Q. Do you know that article?

(Referring to plaintiffs' importation.)

A. I do, sir.

Q. What is that; has that any name in trade that differentiates it from other paper?

The same objection, ruling, and exception.

A. I should call that copying or tissue paper; it is a tissue paper but this form is called copying paper.

Q. Is that printing paper?

The same objection, ruling, and exception.

A. Not as known in the trade.

The plaintiff, Benj. Lawrence, called in rebuttal, said he never heard of there being any technical or trade name, "printing paper;" and that the term "tissue paper" did not designate any particular kind or use of paper, as writing paper, or printing paper, or copying paper, but only its characteristic of thinness, "whether intended for printing or any other use."

The U. S. attorney renewed his motion to have a verdict directed for the defendant, which was again denied.

The judge prefaced his charge to the jury with this observation: "If this cause were on trial in the State courts, I should say that the issue here presented was one to be determined by the court.

But the Supreme Court of the United States long ago laid
23 down the rule that where there was a dispute upon the facts, or where upon disputed facts, two antagonistic inferences could be drawn, it was error not to submit the controversy to the jury. It is in view of that holding that this case is submitted to you."

After stating the claims of the several parties as to the classification of these goods, the judge gave this instruction to the jury: "You will see, gentlemen, that the terms "books and newspapers" are used conjunctively; that is, this paper must be "used for books and newspapers exclusively." In other words, it must be paper applicable to either use.

To this instruction the plaintiffs excepted.

After stating the use to which the paper and copying books made therefrom were put, and that two witnesses of large experience, produced by the Government, had testified that this was "tissue paper,"

coming under that general term, "that it is not printing paper, such as is understood in trade" the judge said: "I do not think that the words used in the statute have any technical meaning. You must take the statute as you find it and a common sense view of the case, and say whether or not this paper which has been produced here, is paper which is used exclusively for books and newspapers; and whether the lawmakers intended, when they used this language, that such paper as has been described to you should come in and pay duty under that clause of the statute which provides for paper used exclusively for books and newspapers."

His honor then told the jury that if they found the
24 copying process described to them to be printing such as the law-makers intended, and that the paper is "used exclusively for newspapers and for books, their verdict should be for the plaintiffs'; but if, on the contrary, they found it was not printing paper used exclusively for books and newspapers, and should not come under this clause, then their verdict should be for the defendant.

The assistant United States attorney then made this request of the court:

Mr. S. B. CLARK: I ask your honor to charge the jury that, if they find upon the evidence that the phrase "printing paper" as used in the trade has a technical signification, and if the plaintiffs' importation in this case does not come within that signification, they shall find a verdict for the defendant.

The COURT: I so charge.

To the granting of this request, and the giving of this instruction, the plaintiffs' counsel excepted.

This instruction and the exceptions thereto were repeated thus:

"Mr. S. B. CLARKE, I do not know whether the gentlemen understood you to charge my request.

The COURT: Gentlemen of the jury, I was requested by the district attorney to charge you that if you find that the words "printing paper" have a technical meaning in trade and commerce, and if you find, further, that the paper within this case does not come within that definition, then, your verdict should be for the defendant. I so charge.

Plaintiffs' counsel excepts.

25 The jury returned a verdict for the defendant."

And because none of the said exceptions so offered and made to the opinion, instructions and decisions of the court do appear upon the records of the said trial; therefore, on the prayer of the said plaintiffs by their counsel, the said judge has signed and sealed this bill of exceptions, *nunc pro tunc*, as of the 18th day of December, 1883.

ALFRED COXE.

[Endorsed:] U. S. circuit court so. dist. of N. Y. Benjamin Lawrence & al. vs. Edwin A. Merritt. Bill of exceptions. Stanley,

Clark & Smith, attorneys for plff's, 160 Broadway, N. Y. city. U. S. circuit court. Filed Apr. 24, 1884. Timothy Griffith, clerk.

26 *Assignment of Errors.*

Supreme Court of the United States.

BENJAMIN LAWRENCE, *et al.*, Plaintiffs in Error,
against
EDWIN A. MERRITT, Collector.

The plaintiffs in error assign for error :—

1. The admission of testimony as to the technical use in trade and commerce of the words "printing paper" and the meaning attached thereto.

2. The instructions given the jury that "books and newspapers," are used conjunctively in the statute, and that only such paper as is indifferently applicable to either use is admissable at the twenty per cent. rate of duty.

3. The granting of defendant's request to instruct, and instructing the jury that if they find "that the phrase 'printing paper,' as used in the trade, has a technical signification and if the plaintiffs importation in this case does not come within that signification, they shall find a verdict for the defendant."

4. The granting of defendant's request, and instructing accordingly (repeating, in different language the foregoing instruction,) that if the jury "find that the words 'printing paper,' have a techni-
27 cal meaning in trade and commerce, and that the paper in this case does not come within that definition, your verdict should be for the defendant.

5. The rendition of judgment for the defendant whereas it should have been given for the plaintiffs for the sum demanded in their complaint.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiffs.

[Endorsed:] U. S. Supreme Court. Benjamin Lawrence & al. against Edwin A. Merritt. Assignment of errors. Stanley, Clarke & Smith, 160 Broadway, New York city, attorneys for plaintiffs. Due service of a copy of the within assignment of error is hereby admitted this 27 of Jan'y, 1885. Elihu Root, attorney for defendant in error. U. S. circuit court. Filed Jan. 27, 1885. Timothy Griffith, clerk.

28 Supreme Court of the United States.

BENJAMIN LAWRENCE AND PHINEAS LAWRENCE, Plaintiffs in error,
vs.
EDWIN A. MERRITT, Defendant in error. } 7026.

And afterwards, to wit, on the third Monday of October, in the year 1885, the said defendant in error by Elihu Root, his attorney, comes here unto court and says that there is no error, either in the

record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said supreme court, before the justice thereof, now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all things affirmed, &c.

ELIHU ROOT,
Attorney for Defendant in Error.

[Endorsed:] U. S. Supreme Court. Benjamin Lawrence and Phineas Lawrence, pl'ffs in error, *versus* Edwin A. Merritt, def't in error. Joinder in error. To Stanley, Clark, & Smith, attorneys for plaintiffs in error. Elihu Root, United States attorney, attorney for defendant in error. Service of a copy of the within is hereby
29 admitted. Stanley, Clarke, & Smith, New York, January 29, 1885, attorneys for plaintiffs in error. U. S. circuit court. Filed Jan. 29, 1885. Timothy Griffith, clerk.

30 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Bond for Damages and Costs.

BENJAMIN LAWRENCE & *al. vs.* EDWIN A. MERRITT.

Know all men by these presents, that we, Henry C. Berlin and George H. Jones, of the city, county, and State of New York, are held and firmly bound unto the above named Edwin A. Merritt, in the sum of five hundred dollars, to be paid to the said Merritt, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas, the above named Benjamin Lawrence & *al.* have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York.

Now therefore, the condition of this obligation is such, that if the above named plaintiffs in error, shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

H. C. BERLIN. [L. S.]
GEO. H. JONES. [L. S.]

Sealed and delivered, and taken and acknowledged, this 24th day of Jan'y, 1885, before me,

WILLIAM W. DAVIS.

31 UNITED STATES OF AMERICA, } ss.
Southern District of New York, }

Henry C. Berlin and George H. Jones, both of New York city, being duly severally sworn, doth depose and say each for himself that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities.

H. C. BERLIN.
GEO. H. JONES.

Sworn to this twenty-fourth day of January, A. D. 1885, before me,

[SEAL.] WILLIAM W. DAVIS,
Notary Public, Kings County. Cert. Filed in N. Y. County.

[Endorsed:] Vol. —, page —. U. S. circuit court. Benjamin Lawrence & *al. vs.* Edwin A. Merritt. Bond for costs on error. —— —— proctor. Approved Jan'y 26, 1885. Hoyt H. Wheeler. Filed this — day of ——, 18—. U. S. circuit court. Filed Jan'y 27th, 1885. Timothy Griffith, clerk.

32 UNITED STATES OF AMERICA:

To Edwin A. Merritt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Benjamin Lawrence & Phineas Lawrence are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Jan. 26th, 1885.

HOYT H. WHEELER.

33 [Endorsed:] 7026. U. S. Supreme Court. Benj. Lawrence & *al.*, plaintiffs in error, against Edwin A. Merritt, defendant in error. Citation.

Due service of a copy of the within citation is hereby admitted this 27 day of January, 1885.

ELIHU ROOT,
Attorney for Def't in Error.

[Stamped:] U. S. circuit court. Filed Jan. 27, 1885. Timothy Griffith, clerk.

Endorsed on cover: S. New York. C. C. U. S. No. 213. Benjamin Lawrence and Phineas Lawrence, plaintiffs in error, *vs.* Edwin A. Merritt, late collector of the port of New York. Filed 11th March, 1885.

31 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.

Henry C. Beslin and George H. Jones, both of New York city, being duly severally sworn, doth depose and say each for himself that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

HENRY C. BESLIN
GEO. H. JONES

Sworn to this twenty-eighth day of January, A. D. 1885, before me.

[SEAL.] WILLIAM W. DAVIS
Notary Public, Kings County. Clerk's No. 15, New York County.

[Endorsed:] No. — Supreme Court. Benjamin Lawrence *et al.* vs. Edwin A. Merritt. Bond. Benjamin ——— proctor. Approved Jan'y 29, 1885. HOYT H. WHEELER, J. U. S. Dated this — day of ———, 18—. Filed ——— 1885. Timothy Griffith, clerk.

32 UNITED STATES OF AMERICA, }

To Edwin A. Merritt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Benjamin Lawrence & Phineas Lawrence are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Jan. 26th, 1885.

HOYT H. WHEELER
J. U. S.

33 [Endorsed:] 7026. U. S. Supreme Court. Benj. Lawrence *et al.* vs. plaintiffs in error, against Edwin A. Merritt, defendant in error. Citation.

Due service of a copy of the within citation is hereby admitted this 27 day of January, 1885.

ELIHU ROOT
Attorney for Def't in Error.

[Stamped:] U. S. circuit court. Filed Jan. 27, 1885. Timothy Griffith, clerk.

Endorsed on cover: S. New York. C. C. U. S. No. 213. Benjamin Lawrence and Phineas Lawrence, plaintiffs in error, vs. Edwin A. Merritt, late collector of the port of New York. Filed 11th March, 1885.

27-113

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

BENJ. LAWRENCE et al.

vs.

EDWIN A. MERRITT.

No. 213.

PLAINTIFFS' BRIEF.

EDWIN B. SMITH,
120 BROADWAY, New York,
Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STREETS.

Supreme Court of the United States.

OCTOBER TERM, 1887.

BENJ. LAWRENCE ET AL.

vs.

EDWIN A. MERRITT.

No. 213.

PLAINTIFFS' BRIEF.

Statement.

The plaintiffs, in September, 1880, imported into New-York, of which port Mr. Merritt was then Collector, forty cases of paper, by them entered as *unsized book-paper*, dutiable at 20%; but the defendant exacted 35% thereon as *tissue paper;* (Rec. 8, fol. 18.) or, rather, as a manufacture of paper, not otherwise provided for.

The question sought to be raised below was the correctness of this liquidation, there being no dispute about the formal prerequisites.

The purpose for which this paper was imported and used was to bind up into the familiar letter-press copy-book, for preserving copies of letters sent.

The plaintiffs' witnesses testified that the paper was "unsized book-paper; neither sized nor glued;" imported to be made into books for the purpose of trans-

ferring letters to a book by writing upon a sheet of paper and transferring the copy of your original to this book, thus preserving a record. (*Id.*, fol. 19.)

The familiar process of transfer was thus described by one of the plaintiffs;—

> You write a letter; and, after writing the letter, you take a sheet of dampened paper and put it over one page, and then put the book in a press and, after it has received pressure, there is a transfer from the original. It is identical with the original writing; exactly on the same principle as printing. It is a form of printing. (*Ibid.*)

Upon his cross-examination, it appeared that this importation was invoiced abroad as 'tissue-paper'; though sent in response to plaintiffs' order for 'copying-paper.' Being then asked by the U. S. Atty. the specific name by which it is known in the trade, he replied;—

> It is known by the trade as copying-paper. (*Ibid.*)

Replying to the next question of the District-Attorney, he said;—

> It is a copying-paper, as shewn in this book, but *not* a tissue paper. A tissue paper is a paper used for wrapping up parcels, to prevent them scratching and to preserve them. It is *a different character* of paper from this; and the copying-paper is of a better quality, and is not used for the same purposes. (Rec. 9, fol. 20.)

By plaintiffs' other witnesses, it was established that "this kind of thin paper was imported to be made up into letter-copying books, and for that purpose *exclusively*"; (*Ib.*) nor do we understand this to be denied.

Cross-examining one of these witnesses, the Dist. Atty. elicited a statement of the obvious fact that, in taking a copy of a letter upon this paper, the ink soaks through the paper; so the copy is read from the side opposite to that which is pressed against the original letter. (*Ib.*)

After the Court had denied a motion by the U. S. Atty. to direct a verdict for the deft.—upon the ground that this paper is not used for printing, within the meaning of the statute ; and that a copying-book is not such a book as the statute intends ;—the government called two witnesses who testified that the importation was "a tissue paper that is used for copying," not for making books or papers, and that it was not printing-paper ; the difference being, as defined by the first witness for the defense, "that printing-paper is a paper which will take an impression from types or plates ; the impression is made on the surface and is read from the surface, and not through the paper." (*Ib.*)

Upon cross-examination, this witness said that

"in that form, [as imported] it is *called a copying-paper*, but it *really is* a tissue paper." (Rec., 9, fol. 21.)

Upon re-direct, he said "that the printing-paper used in trade and commerce does not mean any paper that may be printed on, but has a restricted and technical meaning" ; and that plaintiffs' importation was "not what is called printing-paper in trade and commerce." (*Ib.*)

To the other government witness the U. S. Atty. put these questions, allowed against plaintiffs' objection and exception, answered and exception taken. (*Ib.*)

Q. State whether or not the phrase 'printing-paper' means any paper that may be printed upon, or whether it has any restricted, technical meaning in trade and commerce ?

Plaintiffs' counsel objects, on the ground that it appears on the face of the statute that it is not used as a technical phrase at all. Objection overruled, and plaintiffs except. [Not answered.] (*Ib.*)

Q. Has it a technical meaning ?

[Same objection and exception.]

Ans. It has.

Q. What is the meaning of 'printing-paper' in trade and commerce ?

[Same objection and exception.]

Ans. Printing-paper is paper that is ordinarily used for receiving impressions from types and plates.

Q. Do you know that article? [Plffs.' importation.]

Ans. I do, sir.

Q. What is that? Has that any name in trade that differentiates from other paper?

[Same objection and exception.]

Ans. I should call that copying or tissue paper. It is a tissue paper, but this form is called 'copying-paper.'

Q. Is that printing-paper?

[Same objection and exception.]

A. Not as known in the trade.

Benj. Lawrence, plaintiff, recalled, said he never heard of there being any technical or trade name 'printing-paper';—and that the term 'tissue-paper' did not designate any particular kind or use of paper, as writing-paper or printing-paper, or copying-paper, but only its characteristic of thinness, "whether intended for printing or any other use." (Rec., 10, fol. 22.)

After again denying the deft.'s motion for a directed verdict, the judge thus began his charge to the jury:—(*Ib.*)

If this cause were upon trial in the State Courts, I should say that the issue here presented was one to be determined by the Court. But the Supreme Court of the United States, long ago laid down the rule that where there was a dispute upon the facts, or where upon *disputed* [*sic*] facts two antagonistic inferences could be drawn, it was error not to submit the controversy to the jury. It is in view of that holding that this case is submitted to you.

After stating the claims of the respective parties, as to the classification of these goods, the judge gave this instruction to the jury;—

You will see, gentlemen, that the terms 'books *and* newspapers' are used *conjunctively;* that is, this paper must be 'used for books *and* newspapers exclusively.'

In other words, *it must be a paper applicable to either use.* (Rec. 10, fol. 23.)

To this instruction the plaintiffs excepted. (*Ib.*)

After stating the use to which the paper and copying-books made therefrom were put, and that two witnesses of large experience, produced by the government, had testified this was 'tissue paper,' coming under that general term, 'that it is not printing-paper such as is understood in trade, the judge said;—

I do NOT *think that the words used in the Statute had any technical meaning.* You must take the Statute *as you find it*, and a common-sense view of the case, and say whether or not this paper which has been produced here is paper which is used exclusively for books *and* newspapers; and *whether the lawmakers intended*, when they used this language, that such paper as has been described to you should come in and pay duty under that clause of the Statute which provides for paper used exclusively for books *and* newspapers. (Rec., 10–11, fol. 23.)

His Honor then told the jury that if they found the copying process described to be printing *such as the law-makers intended*, and that the paper is used exclusively for newspapers *and* for books, their verdict should be for the plaintiffs; but if, on the contrary, they found it was not printing-paper used exclusively for books *and* newspapers, and it should not come under this clause, then their verdict should be for the defendant. (*Id.*, and fol. 24.)

The Assistant U. S. Atty. then made this request of the Court:—

MR. S. B. CLARKE. I ask your Honor to charge the the jury that if they find upon the evidence that the phrase 'printing-paper,' *as used in the trade, has* a technical signification; and if the plaintiffs' importation in this case does not come within that signification, they shall find a verdict for the defendant.

THE COURT. I so charge. [The plaintiffs except.] (*Ibid.*)

This instruction was obviously asked for by the Asst. Dist. Atty. with the expectation of its being refused, and to save his exception. He was so taken by surprise at its being granted that this ensued;—

MR. S. B. CLARKE. I do not know whether the gentlemen understood you to charge my request.

THE COURT. Gentlemen of the Jury, I was requested by the district-attorney to charge you that if you find that the words 'printing-paper' have a technical meaning in trade and commerce; and if you find, further, that the paper in this case does not come within that definition, then, your verdict should be for the defendant. I so charge. [The plaintiffs except.] (*Ib.*)

The jury returned a verdict for the defendant. (Rec. 11, fol. 25.)

STATUTE.

Paper, sized or glued, suitable only for printing paper; 25% *ad valorem; printing, unsized, used for books and newspapers exclusively*, twenty per centum *ad valorem;* manufactures of, or of which paper is a component material, not otherwise provided for, thirty-five percentum *ad valorem*. Sec. 2504, Sched. M.
(R. S., 2d ed., p. 479, and Heyl, Dig., § 1368.)

The question is whether, as plaintiffs claim, their importation is dutiable under, or by analogy to, the second of the above clauses; or, as deft. claims, under the third.

Assignment of Errors.

The plaintiffs in error assign for error:—

1. The admission of testimony as to the technical use in trade and commerce of the words "printing-paper" and the meaning attached thereto; (Rec., 9, 10) and the admission of these questions and the answers thereto;—

(1st) Q. State whether or not the phrase 'printing-paper' means any paper that may be printed upon; or whether it has any restricted, technical meaning in trade or commerce? (2d) Q. Has it a technical meaning? (3d) Q. What is the meaning of printing-paper in trade and commerce? (4th) Q. Do you know that article? [plffs. importation.] (5th) Q. What is that? Has that any name in trade that differentiates it from other paper? (6th) Q. Is that printing-paper? Rec., 9, 10.)

2. The instructions given the jury that "books and newspapers," are used *conjunctively* in the statute, and that *only such paper as is indifferently applicable to either use is admissible* at the twenty per cent. rate of duty,—in these words:—

"You will see, gentlemen, that the terms 'books and newspapers' are used *conjunctively;* that is, this paper must be 'used for books *and* newspapers exclusively.' In other words, it must be paper applicable to either use."

(Rec., 10, fol. 23.)

3. The granting of defendant's request to instruct and instructing the jury that—

"if they find that the phrase 'printing-paper,' as used in the trade, has a technical signification, and if the plaintiffs' importation in this case does not come within that signification, they shall find a verdict for the defendant." (Rec., 11, fol. 24.)

4. The granting of defendant's request, and instructing accordingly [repeating, in different language the foregoing instruction], as follows;

"THE COURT. Gentlemen of the jury, I was requested by the district attorney to charge you that if you find that the words 'printing-paper' have a technical meaning in trade and commerce, and if you find, further, that the paper in this case does not come within that definition, then, your verdict should be for the defendant. I so charge." (*Ib.*)

5. The rendition of judgment for the defendant whereas it should have been given for the plaintiffs for the sum demanded in their complaint. (Rec. 7, fol. 16.)

POINTS.

There is no controversy as to what our importation is *in fact*. Its quality, texture, all its characteristics, and the *only* use for which it is manufactured and imported (to which alone it is specially adapted and put) are all known, indisputed and indisputable.

Being what it is, the question of law arises,—at what rate of duty is this foreign article to be admitted into the commerce of this country?

To answer this, a preliminary one was considered;—whether Congress, in the statute dutying "paper . . . printing, unsized, used for books and newspapers exclusively," employed this phraseology with reference to any technical trade understanding of the term 'printing-paper', or according to its ordinary import.

Plaintiffs insist no technical term is used or referred to.

Consequently, they excepted to the admission of testimony that in trade the word 'printing-paper' has a technical meaning, and does not include this letter-book paper.

Upon this question of the existence of such a technical term, and what it implied, arose the only dispute of fact in the case;—upon an issue we claim to be irrelevant and immaterial.

But, even if pertinent, we contend that it was not submitted to the jury under proper instructions.

I.

Has the legislature employed technical nomenclature in imposing a twenty-per-cent duty upon paper for "printing, unsized, used for books and newspapers ex-

clusively"? If *not*, is plaintiffs' importation dutiable at that rate, under that clause, or by similitude thereto?

I. Has the statutory language any occult and technical meaning lurking under its commonplace phraseology?

The legal presumption is the other way.

The representatives of the people are generally supposed to employ in legislation the language of the people, in the sense in which it is currently spoken or written;—with this qualification (equally, and for like reasons, applicable to contracts between individuals)—that if the subject-matter be one pertaining to any special art or business, and the terms of that art or business are employed, then (and then only) it may be assumed that these peculiar terms are used in the restricted sense of that art or business.

But if, in legislating upon a special subject, technical terms are avoided, and the phraseology of common life is adopted, we may well assign to it the ordinary meaning.

This is the effect of the decisions;—that in addressing merchants, using terms of trade, there attaches to the words employed their mercantile signification; but, ordinarily, the common acceptation of the words is the one to be assigned them.

"By the several prayers pressed upon the Circuit Court for instructions to the jury, the object to which they are all directed has been the diversion of the jury from this, the only legitimate inquiry before them. *The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase* "wearing apparel," *some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute,* with the essential purposes and action of the government, and with the widespread if not universal understanding of all who may not happen to fall within the range of a limited and interested class. In instances in which words or

phrases are *novel* or *obscure*, *as in terms of art*, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. . . . It would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the Legislature should select for that purpose language by which the nation, or the mass of the people, must necessarily be misled. The *popular or received import of words* furnishes the general rule for the interpretation of public laws as well as of private and social transactions, and wherever the Legislature adopts such language in order to define and promulgate their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large." Maillard v. Lawrence, 16 How., 261.

In the earlier cases, the words construed were commercial *names*, designating articles of commerce, whereby these were differentiated from like articles with which the laxer speech of daily life confounded them. Some were novel importations, known only to or through trade. Thus, the word "bohea" (9 Wh., 348), represented a trade subdivision of the popular word "tea;" "worsted" (10 Pet., 137) is wool that has been combed; "cotton bagging" (3 How., 106), a particular kind of covering for cotton bales, not including "gunny-cloth," although this is put to like use.

Any effort to show that "tea" meant "tansy" or that "coffee" meant "burnt peas" would have been re-

jected--since no technical education or testimony is necessary to determine the meaning of these words, as there is of "bohea," etc.

In fixing the dutiable rate upon the article we are now considering, no technical term is employed.

It must attract notice that the U. S. attorneys, in attempting to create a trade mystery out of the statutory language, had to change it. Their inquiry throughout was as to the peculiar meaning in trade of the term 'printing-paper'; as if the statute so dutied it *eo nomine* and without more.

If used, there would have been nothing mystical, or to be explained, about that term; but it was not used; and instead of any *specific designation* we find a *descriptive phrase* covering our importations.

It is paper unsized, that is suitable for printing, but of such quality as to be used for books and newspapers exclusively, and not for wall-papers or other purposes. These limitatations and qualifications constitute

"designation of articles by *special descriptione* as contra distinguished from designations by a *commrcial name*- or name of trade. They are designations of quality and material." Barber vs. Schell, 107 U. S., 621,

adopting the views thus expressed by NELSON, J.:

Where "the legislature designates articles by *special description*, as contradistinguished from a designation by a *commercial name*, the proper inquiry is *as to their qualities and characteristics*, with a view to ascertain if they come within *the description:* [*not* to see if they known by a given trade-name.]

Reimer vs. Schell, 4 Blatch., 309.
Marvel vs. Merritt, 116 U. S., 12.

In Fisk vs. Arthur, 103 U. S., 433, mid., the Court refers to the paragraph of the Opinion (per BRADLEY, J.) in Solomon v. Arthur, 102 U. S., 211, declaring that the mixed-material clause, then under consideration, was

" *descriptive* rather than *denominative*; " (103 U. S., 433 mid., citing 102 U. S., 211-2).

Greenleaf vs. Goodrich 101 *Id.*, 278, ¶3.
Swan vs. Arthur, 103 *Id.*, 598.
Newman vs. Arthur, 109 *Id.*, 138, top,

where the Court say, per MATTHEWS, J.;—

" There is no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances."

Referring to plaintiffs' particular importation in question the U. S. Atty. asked;—

Q. Do you know the article? What is that? Has it any name that differentiates it from other paper? Is that printing-paper? (Rec. 10, fol. 22).

Not denying that the article was printing-paper *in fact*, the witness (who answered against our objection) said it it was not " as known in the trade." (*Ib.*).

Of this testimony, that may be said which was said by the CHIEF-JUSTICE of a similar attempt, three years ago;—

" The effort was to put the opinion of commercial experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. Thus it was decided in Greenleaf vs. Goodrich, could not be done," etc.

Schmieder vs. Barney, 113 U. S., 648.

The CHIEF-JUSTICE thus enunciates the just and salutary rule, that all efforts to draw into the realm of mystery and technicality the language of common life—the meaning of which is apparent upon the face of the statute, and is " as well understood by the community at large as by merchants "—would prove futile, by whichever party made.

Burke says, of all human laws, " where mystery begins, justice ends."

It may be noticed, en passant, that the presumption of the ordinary use and meaning of words is sought to be rebutted, and the language converted into a trade-mystery, by the testimony of *two* witnesses against a greater number to the contrary (Rec., 8, 9, 10)—which seems scant testimony of a usage which, to affect ordinary language, ought to be universally understood and adopted in the trade.

And, as we show below, the effort is to attach to the term "printing" a narrower meaning than this Court has already declared is to be given it in this statute.

Arthur vs. Moller, 97 U. S., 367-8.

II.

If the statutory language is *not* technical, does it—taken in its ordinary sense—include the present importation within its terms?

This inquiry divides itself. *First*, is this paper for printing of the condition mentioned, i. e., unsized, etc.; *second*, is it used for books *or* newspapers exclusively—(for we shall show the error of the Court in ruling that 'and' was employed conjunctively)—that is, are the books, for the making of which it is indisputably exclusively imported (Rec., 9, top) "books" within the meaning of the statute?

It may be well to reverse this order of inquiry; for if these are *not* "books," their composition is immaterial. If they *are* 'books,' then we must ask if they are books made of paper suitable for printing.

First. Are these well-known letter-books "books"?

Any individual, merchant, lawyer, or what not, who desired to refer to an old correspondence would ask his

clerk to bring him the *book* containing the letters of a given date or period. Any one, wishing to preserve a record of his own action, would direct it to be copied into the *book*.

The sheets go to a bindery, to be bound up into a book.

"BOOK. (1) A collection of sheets of paper, or similar material, BLANK, written or printed, bound together." Webst. Dict., *h. t.*
"TO BOOK. (verb) To enter, write or register in a book." (*Ib.*)
"BOOK. A volume in which we read *or write*." Johns. Dict.

The other lexicographers give like definitions.

There is no authority for testimony of defendant's witnesses as to how anything is *read*, to constitute printing, or the matter a book.

Music, to be bound up, is a book. Clayton vs. Stone, 2 Paine, 82.

White vs. Geroth, 2 B. & Ald., 300.

So. MSS. notes of a physician. Willis vs. Curtois, 1 Beav., 189.

Patterns to cut dresses by. Drury v. Ewing, 1 Bond, 540.

SECOND. That plaintiffs' importation is "unsized, neither sized nor glued," (Rec. 8, fol. 19) nobody denies; nor that it is used exclusively for these 'books' —is imported only for this use. The denial is that the using of the books to receive transcripts is printing: and that paper solely designed and brought here to be *so* used is printing-paper.

Webster thus defines

Print (noun). 1. A mark made by impression; a line, character, figure, or indentation, made by the pressing of one body or thing on another; mark; *sign imparted* or communicated."
"PRINTING. The act, art or practice of impressing letters, characters or figures on paper, cloth, or other material.
To PRINT. (1) To press or impress; to imprint. (2) To take an impression of; *to copy*, or take off the impress of; to stamp. (3) Hence, specifically, to strike off *an impression or* impressions of, from types, stereotype or engraved plates, *or the like*, by means of a press, etc. (4) *To mark by pressure;* to *form an impression* upon; to cover with figures by a press, or something analogous to it.

This lexicographer and many others are quoted by HUNT, J., in the Opinion in

Arthur vs. Moller, 97 U. S., 367–8.

This Court held, in Arthur vs. Moller, that it was printing to apply the several colors of a chromo by successive impressions of as many different stones. (97 U. S., 365.)

It can make as little difference that the words are copied by soaking and read from the opposite side (Rec. 9, mid.), or any other such peculiarity of the particular method of printing: such as "Reading it backward, like a Hebrew book."

The whole struggle of the defence, made effective by the erroneous rulings of which we complain, was to place an entirely different and more restricted meaning upon the word 'printing' than this Court declared belonged to it in this very statute. (97 U. S., 367–8.)

The articles there declared to be printed were not *read* any way; neither from the surface, nor through the paper; yet they were produced by printing.

Manifestly, the government witnesses, in the cause at bar, considered nothing to be 'printing' except legible words; words known of themselves to articulate speech; yet the context shows such is *not* the meaning of the statute. (97 U. S., 367-8.)

Photographs are *printed*, not by pressure, but chemical action.

Nor was this a manufacture of paper; it was the article itself.

Hartranft vs. Wiegman, 121 U. S., 615.
U. S. vs. Potts, 5 Cr., 284.
Frazer vs. Moffit, 20 Blatch., 267.

Suppose it to be known as tissue-paper; yet that was merely a sub-classification, like the names given different kinds of laces, etc.

Smith vs. Field, 105 U. S., 53.

If its designed *use* was such as the law contemplated —exclusively that—it is of no consequence if it had a sub-name ; if it was 'tissue' printing paper for books exclusively.

But the plaintiff was right in his definition, and in his testimony that this is not tissue-paper. (Rec. 9, top ; 10, mid.)

"TISSUE-PAPER. A very thin gauze-like paper, made of several sizes, and used for the protection of engravings, and for wrapping fine and delicate articles. 3 Knight's Am. Mech. Dict., 2581, *h. t.*
De Colange, Am. Dict. of Com., *h. t.*

A very thin, unsized paper, for wrapping or packing. Worc. Dict., *h. t.*

Tissue-paper—Very thin, gauze-like paper, *such as is used to protect engravings in books*, Webst. Dict., *h. t.*

A very thin, gauze-like paper, such as is used for protecting engravings in books, *wrapping fine and delicate articles*, &c. Imp. Dict., *h. t.*
Stormonth's Dict.

III.

This Instruction was wrong, viz. :—

That the terms 'books *and* newspapers' are used *conjunctively ;* that is, this paper must be 'used for books *and* newspapers exclusively.' In other words, *it* [the importation] *must be paper applicable to either use.* (Rec. 10 bottom.)

Thus the statutory phrase is narrowed down by the successive exclusion of very large classes of paper.

First, it must not only *be* printing-paper in fact, but must be known to that indeterminate body designated as 'the trade' as such ; *i. e.*, no matter if the proof showed it was *always* imported for the sole purpose o being printed upon, and for books, it must *also* be commercially known as 'printing-paper.'

Second, it must not only be such paper, commercially so known, but in addition it must be of a character which adapted it for either use. Paper used *only* for newspapers would not satisfy the law; *nor would that used exclusively for books.* This last limitation practically shut out our importation from the benefit of this statutory clause by judicial construction, while the case was nominally submitted to the jury.

See the commencement of the charge, at bottom of p. 10 of the record.

In view of the fact, so universally known as to be matter of judicial cognizance (91 U. S., 42 top) that a better class of paper is, generally speaking, used for books than for the issues of the daily press,—a difference in the material from which the respective qualities are made—it could not have been the design to exclude from this rate paper for the best and most useful books and also paper only used for the cheap dailies, like the "N. Y. News" and "Journal."

Only the cheapest, ephemeral reading is printed in book form upon paper also employed by the ordinary newspaper.

We deny that Congress intended to discriminate in favor of the "Dime Novel."

The 'and' is *not* to be taken "conjunctively," but distributively, as this Court lately declared Congress used it, in the same Act, in dutying "mineral *and* bituminous substances."

"This is to be taken distributively, so as to cover all substances within the description, whether mineral *or* bituminous, *or both*, and *is not to be confined to those which combine both characters.*"

Marvel vs. Merritt, 116 U. S., 12.
Porter vs. State, 58 Ala., 66.
State vs. McCoy, 2 Speers, 716.
Streeter vs. Peo., 69 Ills., 595.
Miller vs. St., 3 Oh. St., 475, THURMAN, C. J.
St. vs. Myers, 10 Iowa, 448.
St. vs. Smith, 46 *Id.*, 672–3.

Foster vs. Com., 8 Watts & S., 80, bot.
Barker vs. Esty, 19 Vt., 132.
Roome vs. Phillips, 24 N. Y., 470.
Boag vs. Lewis, 1 Up. C., Q. B., 357.
Com. vs. Griffin, 105 Mass., 185.
Peo. vs. Sweetsir, 1 Dak., 314.

IV.

After inviting the jurors' attention to the testimony of "two witnesses of large experience, produced by the government" whom he had permitted to state "that it is not printing-paper, such as is understood in trade," the judge said (most inconsequentially, as we think).

"*I do not think that the words used in the Statute have any technical meaning;*

and then thus proceeds to submit this question of law to the jury:—

"You must take the statute as you find it, and a common-sense view of the case, and say whether or not this paper which has been produced here is paper which is used exclusively for books *and* newspapers; and whether the law-makers intended, when they used this language, that such paper as has been described to you should come in and pay duty under that clause," etc. (Rec., 11.)

He then went on, directing the jury to ascertain whether the copying-process was "printing *such as the law-makers intended*," and the paper "used exclusively for newspapers *and for books:*"—if yea, their verdict should be for the plaintiffs; otherwise, for the defendant. (*Ib.*)

The plaintiffs had excepted to the instruction that the statutory 'and' was used conjunctively; the judge

had told the jury he did *not* think there was any technical meaning to be attached to the words employed (which was as we contended); so we did not *then* except further to his submitting the legislative intent to the jury, *with these qualifications;*—but when, by giving the instructions requested by the U. S. Atty., (*Ante*, pp. 5, 6, and Rec. 11, fol. 24) it was left to the jury to find if the phrase 'printing-paper, etc.' had a technical signification *in trade*, and to return a verdict against us if this were found affirmatively, unless the jury also found that our importation came within this technical meaning, we did except. (*Ib.*)

The error in this instruction is palpable. It made the charge *felo de se*. Its incongruity with what immediately preceded was such as to lead to its repetition, lest the jury should not comprehend it. (*Ib.*)

The instructions, taken together, were of this purport;—that, although the Court did *not* consider the *statute* to use a technical term, yet if the jury found there was such a term *in trade and commerce*, and our goods were not within the trade-term, the verdict must be against us, notwithstanding the statutory use was *not* technical!!

If, taken in connection with the before-quoted language of the charge, the purpose and effect was to submit to the jury the true construction of the statute, with leave to find this to be contrary to the view expressed by the Court, there was error in submitting a question of law to the jury.

But the plain meaning of all the instructions was that our rights were limited by a trade technicality which Congress did *not* have in contemplation in this enactment!

We deny that there was any issue of *fact* in this case. One was artificially created, first, by treating the statute as though the mere term 'printing-paper' had been employed by the legislature, and then—after

declaring to the jury that the statute did not use this term technically—submitting to them the inquiry whether or not it had a technical meaning in the trade, and subjecting us to such meaning (if found to exist) coupled with the further condition that ours must be paper indifferently suited for use in books *and* newspapers.

What the jury would have said (if trade denomination has aught to do with this case) if permitted to find whether or not there was a trade usage *to which the statute referred*, and without considering whether our importation was equally as well adapted for use in newspapers as in books, is what we have a right to have determined upon a new trial, under proper instructions.

EDWIN B. SMITH,
120 Broadway, New York,
Of Counsel.

27-113

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In the Supreme Court of the United States.

OCTOBER TERM, 1887.

BENJAMIN LAWRENCE AND PHINEAS LAWRENCE, plaintiffs in error,
vs.
EDWIN A. MERRITT, LATE COLLECTOR OF THE PORT OF NEW YORK.
No. 213.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

On the 4th of September, 1880, the plaintiffs entered at the port of New York forty cases of paper, imported by them as unsized book paper, which they claimed was dutiable at the rate of 20 per centum ad valorem as "unsized printing paper, exclusively for books and newspapers."

The paper was invoiced abroad as tissue paper, but one of the plaintiffs testified they called it copying paper. The defendant, who was collector of the port, assessed and collected duty upon it at the rate of 35 per cent. ad valorem. Protest was filed, appeal taken, the duty was paid, and suit brought by the plaintiffs to recover $346.80, the difference between the duty at 20 and 35 per cent. The issue in the case was, should or should not the paper have been classified as unsized printing paper, used exclusively for books and newspapers? The question was, under instructions of the court, submitted to the jury, who found for the defendant. The plaintiffs excepted to the charge, and the alleged errors contained in the bill of exceptions are the grounds on which they ask a reversal of the judgment.

BRIEF OF ARGUMENT.

The plaintiffs claimed the merchandise should have been classified and taxed under the following clause of Schedule M of section 2504 of the Revised Statutes (page 479):

> Paper, sized or glued, suitable only for printing paper, twenty-five per centum ad valorem; printing, unsized, *used for books and newspapers exclusively, twenty per centum ad valorem;* manufactures of, or of which paper is a component material not otherwise provided for, thirty-five per centum ad valorem; sheathing paper, ten per centum ad valorem.

The collector classified the paper under the following clause on the same page:

> Paper hangings, and paper for screens or fire-boards, paper, antiquarian, demy, drawing, elephant,

foolscap, imperial letter, *and all other paper not otherwise provided for*, thirty-five per centum ad valorem.

The evidence of one of the plaintiffs showed, the paper was invoiced abroad as tissue paper, though the importers called it copying paper (Rec., p. 8). Defendant's witnesses testified it was known in trade and commerce as tissue paper or copying paper, and was not known as printing paper, and that another class of paper was known in commerce as printing paper. (Rec., p. 9 and 10.)

The paper was adapted for use as a copying paper, by transferring a copy of a letter or writing from the side on which it is pressed on the paper through the paper, so that it is legible on the other side, and for this purpose it is manufactured into copying books. (Rec., p. 8.)

The first, third, and fourth assignments of error (Rec., p. 12) are to the admission of evidence as to whether printing paper was a commercial designation, and the effect of such designation, in case it was found to be commercially known as descriptive of this class of merchandise.

The clause under which the plaintiff claimed the paper should have been classified contained two elements, both of which must be found in the paper to justify a classification under it. Those elements are that it must be "*printing paper*," and that it must be such printing paper as was *used for books and newspapers exclusively*. If it was not printing paper it should not have been classified as the plaintiffs claimed, or if it was printing paper, but was not exclusively used for books and newspapers, the classification contended for by the plaintiffs would have

been erroneous. It would be a complete defense to the action to prove that it was not printing paper.

The defense, then, had the legal right to prove that fact by any competent evidence:

> The commercial designation of an article among traders and importers, when such denomination is clearly established, fixes its character for the purposes of the tariff laws. (*Arthur* vs. *Lahey*, 96 U. S. R., 112.)

The evidence whose admission was excepted to tended to prove, by a witness who was competent to testify, that printing paper was a commercial designation known in trade and commerce. It was, therefore, relevant to a material issue in the case, and the testimony was competent.

That issue, too, was one that, if found for the defendant, was conclusive of the case; for if it was not printing paper it did not belong to the class on which 20 per centum ad valorem tax was imposed. There was, therefore, no error in the instruction of the court—

> That if the words "printing paper" have a technical meaning in trade and commerce, and if you find further that the paper within this case does not come within that definition, then your verdict should be for the defendant.

The second error assigned is:

> The instructions given the jury that books and newspapers are used conjunctively in the statute, and that only such paper as is indifferently applicable to either use is admissible at the 20 per cent. rate of duty.

This assignment does not conform to the bill of exceptions, nor the instructions given by the court. The words "indifferently applicable" do not occur in the instruction

of the court. In the portion of the charge excepted to the court says (Rec., p. 10):

> You will see, gentlemen, that the terms "books and newspapers" are used conjunctively; that is, this paper must be "used for books and newspapers exclusively." In other words it must be paper applicable to either use.

The language of the clause describing the property comprised in this class is:

> Printing, unsized, used for books and newspapers exclusively. In other words it must be paper applicable to either.

The word "either" means "one or the other." It does not mean "both." The charge, then, was that the paper must be applicable to the one use or the other. This is certainly as favorable to the plaintiffs as they could rightfully ask. The context to this interpretation of the clause as given by the court is but a statement of the language of the clause. Outside of the language of the law-makers, the interpretation given by the court is "it must be applicable to one or the other use."

The real cause for complaint with reference to this part of the charge would be on the part of the defendant, for the use of the conjunction "and" requires that the character of the paper should be such that it could be used for both books and newspapers. "Or" should not be substituted for "and" in the clause without some substantial reason. There is no sufficient reason for the substitution, for the same kind of unsized paper can be and is indifferently used for both, and this is doubtless the character of paper intended by the act.

In no possible sense could the tissue paper involved in this case be called printing paper. Copying letters in a letter-book is not printing as it is either technically or popularly understood. To print is "to impress *by means of letters* or types on paper, cloth, or other material." (Worcester's Dictionary.) In the art of printing the types, the plate, or the stone which produces the impression is the *means* only; the impression produced is *the end*. In copying, the letter, deed, or instrument is *the end*, and the copy is only the *means* used to preserve evidence of it.

To record or copy a deed in order to perpetuate it is not called printing. The deed is the conveyance; the copy of it is only a means to perpetuate it. A letter written is the instrument of real value, and for the purpose for which it is written is the finished product. The type, the plate, or the stone in printing is not the final product, but only a part of the machinery to produce it. The letter to be copied is not a means, but an end. It can not be relegated to the place of a means, and regarded as a mere type or plate used in printing, because the writer might find it necessary to have it copied. The fact that he used tissue paper on which to copy it would not make the tissue paper printing paper. It would be what it is, copying paper.

It is therefore respectfully submitted, on the plaintiff's own showing, the court should have entered judgment for the defendant.

G. A. JENKS,
Solicitor-General.

4-113

Burgoyne Quick Printing Co., cor. Centre and Walker, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1887.

BENJ. LAWRENCE ET AL.

vs.

EDWIN A. MERRITT.

No. 213.

PLAINTIFF'S BRIEF IN REPLY.

I.

Admitting that we have to prove our importations to be paper manufactured for use in printing books and newspapers exclusively, we contend that the true issue is whether or not it is such *in fact*—not how the term "printing paper" is understood in commerce; because the statutory clause is *descriptive*, and not *denominative;* so Arthur vs. Lahey, 96 U. S., 112, and similar decisions, do not apply.

II.

The Solicitor-General entirely overlooks the Judge's instruction that "books *and* newspapers are used *con-*